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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-1156

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATION OF ROBERT L. MOHR. D.B.A. ADVANCED ELECTRONICS For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Palos Verdes Estates, Los Angeles, Calif.	Docket No. 18652 File No. 2391–M–P–35
APPLICATION OF GENERAL TELEPHONE COMPANY OF CALIFORNIA For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Malibu, Calif.	Docket No. 18653 File No. 2683–M–P–95
APPLICATION OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY For a Construction Permit To Relocate Public Class III–B Coast Station KMB–393 From San Pedro, Calif., to Dakin Peak, Near Avalon, Santa Catalina Island, Calif.	Docket No. 18654 File No. 2729–M–P–105
APPLICATION OF GENERAL TELEPHONE COMPANY OF CALIFORNIA For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Santa Barbara, Calif.	Docket No. 18655 File No. 2684–M–P–95
APPLICATION OF COAST MOBILPHONE SERVICE For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Santa Barbara, Calif.	Docket No. 18656 File No. 2606–M–P–75
APPLICATION OF THE TELEPHONE COMPANY, INC. (SILVER BEEHIVE) For a Construction Permit for a New Public Class III–B Coast Station To Be Located on Santa Cruz Island, Calif.	Docket No. 18657 File No. 4879–M–P–48
APPLICATION OF THE TELEPHONE COMPANY, INC. (SILVER BEEHIVE) For a Construction Permit for a New Public Class III–B Coast Station To Be Located at San Clemente Island, Calif.	Docket No. 18658 File No. 4997–M–P–58

109-023—73——1

APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATIONS CO. For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Broadcast Peak, Near Santa Barbara, Calif.	Docket No. 18659 File No. 5163–M–P–78
APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATIONS CO. For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Cuesta Grade Peak, Near San Luis Obispo, Calif.	Docket No. 18660 File No. 5162–M–P–78
APPLICATION OF R.C.S., INC. For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Tassajera Peak, Near San Luis Obispo, Calif.	Docket No. 18661 File No. 5283–M–P–88
APPLICATION OF DANA POINT MARINE TELEPHONE CO. For a Construction Permit for a New Public Class III–B Coast Station To Be Located at Santiago Peak, near Dana Point, Calif.	Docket No. 18662 File No. 5447–M–P–98
APPLICATION OF THE PACIFIC TELEPHONE AND TELEGRAPH CO. For Renewal of License of Existing Public Class III–B Coast Station KMB–393 at San Pedro, Calif.	Docket No. 18663 File No. 5615–M–RL–128

ORDER

(Adopted December 20, 1972; Released December 26, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. We have before us for consideration: (a) an application for review of a final Decision of the Review Board, FCC 72R–210, 37 FCC 2d 1, released August 8, 1972, filed by The Telephone Company, Inc. on October 3, 1972; (b) an application for review of the above Decision of the Review Board, filed by Coast Mobilphone Service on October 3, 1972; (c) an opposition to the application for review of The Telephone Company, Inc., filed by The Pacific Telephone and Telegraph Company on October 16, 1972; (d) comments to the application for review of The Telephone Company, Inc., filed jointly by Southern California Marine Radio Council, R. L. Mohr d/b/a Advanced Electronics, Dana Point Marine Telephone Company, and R.C.S., Incorporated on October 10, 1972; (e) a reply to both applica-

tions for review, filed by General Telephone Company of California on October 16, 1972;[1] (f) a reply to the opposition of The Pacific Telephone and Telegraph Company, filed by The Telephone Company, Inc. on October 27, 1972;[2] and (g) a request for a conditional grant of authorization, filed jointly by Southern California Marine Radio Council, R. L. Mohr d/b/a Advanced Electronics, Dana Point Marine Telephone Company, and R.C.S., Incorporated on October 10, 1972.[3]

2. In view of the action we take today, we consider the request for a conditional grant of authorization to begin construction and operation to be moot.

3. Accordingly, IT IS ORDERED, That the request of Southern California Marine Radio Council, R. L. Mohr d/b/a Advanced Electronics, Dana Point Marine Telephone Company, and R.C.S., Incorporated for conditional authorization, DISMISSED AS MOOT.

4. IT IS FURTHER ORDERED, That the motion of The Telephone Company, Inc. to take notice of the proposed report of Examiner John R. Gillanders of the Public Utilities Commission of the State of California IS GRANTED; and that the petition of The Telephone Company, Inc. to deny acceptance of comments of the People of the State of California and the Public Utilities Commission of the State of California, IS GRANTED.

5. IT IS FURTHER ORDERED, That the applications for review filed by The Telephone Company, Inc. on October 3, 1972, and by Coast Mobilphone Service on October 3, 1972, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] Untimely comments to both applications for review were tendered for filing by the People of the State of California and the Public Utilities Commission of the State of California on October 19, 1972. A motion to deny acceptance of the late tendered comments of the People of the State of California and the Public Utilities Commission of the State of California was filed by The Telephone Company, Inc. on October 27, 1972. We believe that the motion of The Telephone Company, Inc. should be granted, and therefore said comments have not been considered by this Commission in the disposition of the applications for review. See Section 1.115(d) of the Commission's Rules.

[2] The Commission also has before it a motion to take notice of a proposed report of Examiner John R. Gillanders of the Public Utilities Commission of the State of California, filed by The Telephone Company, Inc. on November 2, 1972; and two oppositions to the above motion, filed by The Pacific Telephone and Telegraph Company on November 6, 1972, and by The People of the State of California and the Public Utilities Commission of the State of California on November 8, 1972. In order to enable The Telephone Company, Inc. to obtain the benefit of all contentions advanced in support of its application for review, we shall grant the motion.

[3] The named parties also filed an *erratum* to that request on October 13, 1972.

F.C.C. 73-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE COMMISSION'S RULES TO PROVIDE FOR EXPANSION OF THE TELEPHONY SEGMENTS OF THE HIGH FREQUENCY AMATEUR BANDS	Docket No. 19162; RM-1306, RM-1349, RM-1477, RM-1479, RM-1544, RM-1550, RM-1593, RM-1603, RM-1614, RM-1616, RM-1644, RM-1665, RM-1695, RM-1723, RM-1729, RM-1748, RM-1873, RM-1880

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration its Report and Order (FCC 72-849) released October 2, 1972, in the above-entitled proceeding, and the Petition For Partial Reconsideration filed by the American Radio Relay League (ARRL), and the Petition for Reconsideration filed by Gerald N. Seligman, et al.

2. The ARRL Petition requests the Commission to reconsider its Report and Order, and amend its rules to make frequencies 3,825–4,000 kHz available for radiotelephony operation to all but Technician and Novice Class amateur radio operators. ARRL repeats the request made in its Comments in Response to Notice of Proposed Rule Making filed on June 1, 1971, for relief from overcrowding in the 3,900–4,000 kHz telephony segment then available to all amateur radio licensees except Technician and Novice Class. ARRL states that in the seventeen months subsequent to filing comments, overloading in that frequency segment has become even more severe.

3. The Seligman Petition requests the words, "the transmitter shall be crystal controlled," be allowed to remain in Section 97.7(d)(1) of the rules. Petitioner would return the requirement for the frequency of a transmitter operated by a Novice Class control operator to be derived from an oscillator circuit utilizing a piezoelectric crystal. Petitioner states the belief the deletion of this requirement is deleterious to the Amateur Radio Service, and will prove to be detrimental to Novice Class type of operation.

4. The frequency allocation under the reconsideration requested by ARRL is popularly known as "75 meters," and is that frequency segment authorized for A3 and F3 radiotelephony in the 3,900–4,000 kHz amateur frequency band. Until our Report and Order, 75 meters occupied 200 kHz of the high frequency spectrum from 3.8–4.0 MHz. In our Report and Order, an additional 25 kHz was authorized for A3 and F3 radiotelephony, expanding it to the 225 kHz between 3,775–4,000 kHz. Four amateur radio operator classes, other than Novice and Technician Class, are permitted to operate stations in this frequency segment, subject to a system of expanding frequency privileges according to the level of difficulty in the examination requirements for each class. The objective is to offer an incentive for encouraging individual amateur radio operators to improve their technical and operating skills. Our Report and Order provides 110 kHz in the 75 meter frequency band for all four classes, an additional 90 kHz for the higher Advanced and Amateur Extra Classes, and another 25 kHz for the highest operator class, Amateur Extra. Petitioner in effect requests the 75 meter frequency allocations for incentive purposes be amended to provide 175 kHz for all four classes and only 25 kHz exclusively for the combined Advanced and Amateur Extra classes. The petition does not request changes to the 25 kHz specified for Amateur Extra Class only.

5. In support of the request, ARRL submits a *Net Directory* listing almost 300 amateur radio networks registered with their organization. Typical examples are the *Eastern Pennsylvania Emergency Phone & Traffic Net*, which the Net directory indicates operates on the frequency of 3.917 MHz every day starting at 2300 GMT, and the *Delaware Emergency Phone Net* which operates on 3.904 MHz on Saturdays at 2300 GMT. Petitioner notes that all but two of the 154 registered networks with radiotelephony operations in the 75 meter frequency band have selected the frequency segment where all four license classes have operating privileges, and this activity accounts for 606 regularly scheduled network sessions each week. The other two networks have selected frequencies restricted to stations operated by Advanced and Amateur Extra Class operators, which represent but 7 regularly scheduled network sessions. ARRL claims there are many other non-registered, casual conversational networks, almost all of which choose to also operate in the same 75 meter frequency segment as the 154 registered networks and subsequently contribute to the overcrowding. ARRL claims that amateur radiotelephony networks operating between 3,900–4,000 kHz were the primary communication circuits for many days following the 1972 disasters in South Dakota, Pennsylvania, and New York.

6. ARRL gives as the reason for the frequency selection pattern by these network participants, that the incentive of less interference in the exclusive frequency segments available only to Advanced and Amateur Extra Class licensees has been insufficient for some key members of these networks to upgrade their licenses to these two higher

classes and obtain the additional privileges, even though, as ARRL reports:

". . . overloading has become so severe, both because of general communications as well as net operations, that everyone has suffered intolerable interference at times, and nets often have been unable to fulfill their roll even in times of emergency . . ."

7. The Seligman Petition presents the following argument in favor of returning Section 97.7(d)(1) to the previous wording:

". . . the newly licensed Novice will be tempted to buy the SSB transmitter or transceiver that will eventually be used after he has upgraded his license, since this type of equipment is controlled by a variable frequency generating device. This type of equipment usually has a much greater power rating than the Novice is permitted to utilize, and normally cannot be detuned or lightly loaded enough to the extent required to operate at a 75 watt input level." and "due to the relative complexity of variable frequency generating devices, the beginning Novice Class licensee will be discouraged from home-constructing his own transmitter, thus leading to a reduction in technical skills and experience in the Amateur Radio Service, and contrary to the Commission's Basis and Purpose for the Amateur Radio Service as brought forth in Part 97.1."

8. In considering the over-crowding existent on many of the amateur bands, including 75 meters, the Commission fully realizes the difficulties of communicating under the conditions prevailing. We are mindful that our actions must be in the overall interests of the Amateur Radio Service. In this we are guided by the basis and purpose of the Service contained in Section 97.1 of the Rules. However, we do not consider that 97.1(a) precludes or normally should be accorded higher priority in respect to our decisions than 97.1(c) which relates to ". . . rules which provide for advancing skills in both the communication and technical phases of the art."

9. It might appear from the comments of the ARRL that they would espouse a common-denominator level of achievement in the Amateur Radio Service rather than actively support the upgrading incentive plan for which they indicate approval. Insofar as is known, the ARRL has not initiated any recent major program to upgrade the status of the lower classes of licensees. In this country there are approximately 23,000 Novice Class, 52,000 Technician Class, 30,000 Conditional Class, 87,000 General Class (both currently having the same privileges), 59,000 Advanced Class and 12,000 Extra Class operator licensees. Recent information, obtained from reexamination of certain Conditional Class licensees, indicates that probably a large percentage of that category of licensee does not meet the Commission's qualifications to occupy the high frequency bands which, as ARRL points out, are already over-crowded. It is well known that in many countries, the highest grade of license is required for radiotelephone operation on certain high frequency bands. In Canada, for example, that situation prevails and as a result, approximately 70% of their amateur population holds the highest class amateur license. It is considered that this is the most appropriate direction in which to pursue further measures to relieve the interference situation, rather than further expanding a phone sub-allocation for use of the lower classes of licensees which

would only further compound the problem. Further attention will be given this matter in appropriate actions. In so doing, the Commission will continue to be guided by what is believed to be the overall best interests of the Amateur Radio Service.

10. Further, the petitioner ARRL does not provide a rationale for the specific frequency sub-band allocation requested. In reviewing the many frequency allocation plans proposed in comments filed in response to our Notice of Proposed Rule Making in this Docket, including the petitioner's plan, we find most of them to be subjective in their approach, and fail to account for the results of the upgrading incentive system. Overall, offering additional frequency privileges as an incentive to upgrading has proven to be workable. The number of Advanced and Amateur Extra Class licensees continues to increase while the number of General and Conditional Class licensees decreases. It is important to the further success of this system that as upgrading progresses, the frequency sub-bands must be systematically and periodically revised. When the number of licensees authorized to operate in each sub-band changes significantly, there must be corresponding modifications to the frequency privileges for the affected license classes. The method selected and outlined in the Report and Order was designed to provide an objective formula approach to the amendments adopted, and for future adjustments to frequency privileges. Sub-band apportionments are determined by considering the number of individual licensees in each group having privileges to each sub-band, *weighted in favor of the higher classes.* Therefore, assuming the present upgrading pattern continues as we anticipate, there will be further expansion of the exclusive-frequency privileges for the Advanced and Amateur Extra Classes, and a corresponding reduction in the frequency privileges for General and Conditional Classes.

11. Petitioner ARRL does not support its claim that between June 1, 1971, and November 1, 1972, overloading in the 75 meter frequency segment available for radiotelephony has become more severe. Commission records show that during this same period, the number of General/Conditional Class licensees decreased about 5%, and the number of Advanced and Amateur Extra Class licensees increased about 6%. Therefore, the number of amateur radio operators having access to the exclusive-frequency segments increased, and it does not seem likely they would choose not to exercise their new privileges.

12. We agree with the ARRL that it is unfortunate that key members of the amateur radio networks do not choose to upgrade their operating skills and privileges. However, we cannot agree that the solution is to compromise the upgrading system by authorizing additional privileges for the General/Conditional Class licensees at the expense of the Advanced/Amateur Extra Class. Rewarding those who have not upgraded at the expense of those who have, would be an unwise and illogical approach. If, as petitioner claims, key members of the radiotelephony nets do not find the incentives offered under the present system sufficient to increase their desire to upgrade their licenses, then incentives should be increased, rather than decreased as

proposed by ARRL. Also, there is the possibility that participation in network communications does not fully provide the experience and training necessary for upgrading. We shall keep these aspects in mind in future proceedings.

13. For the individual General Class or Conditional Class operator finding the overcrowding on 75 meters intolerable, he may select another frequency band or emission for his amateur radio communications. He may also improve his skills, upgrade to a higher class operator license, and earn additional frequency privileges. The new frequency allocations adopted in our Report and Order present new opportunities in the way of upgrading incentives. We believe every amateur radio operator should be encouraged to develop the skills necessary to meet the requirements of the next higher license class.

14. While it is correct that amateur radio nets undoubtedly do have value to the public, it is also true that the Amateur Radio Service can be more effective when the individual operators have advanced their communication and technical skills. Indeed, it appears from the information supplied with the Petition, that a significant percentage of the frequencies allocated to the Amateur Radio Service are heavily occupied by net type operation. Yet, ARRL did not include either quantitative or qualitative data on that type of amateur radiocommunication being accomplished in the name of public service.

15. Although we have not been provided a comprehensive report of the complete activities of amateur radio operators in providing radiocommunications for the public during the 1972 disasters, we are aware it was extensive and excellent. Reports received to date indicate other amateur radiocommunication systems were used in addition to 75 meter radiotelephone, including VHF–FM repeater stations, and radiotelegraphy. Also, the Citizens Radio Service provided some of the needed communications. As noted by the petitioner, during the disasters of 1972, the Commission did declare certain frequencies for use only by amateur operators participating in emergency communications, when necessary. It is clear there are provisions to make the necessary frequencies available to amateur operators in an emergency.

16. The Seligman Petition does not submit any evidence supporting the claim that amateur single sideband transmitters and transceivers normally cannot be operated at the maximum power level authorized for the Novice Class. We are aware of several manufactured units having this capability. In fact, we are not aware of any that do not. Should there be such units available to amateurs, they would be unsuitable for Novice Class operation, but this is not sufficient reason to require crystal control.

17. Additionally, we are not overly concerned if the Novice Class operator initially does not construct his own transmitter. While it would be valuable experience for him, his main concern should be to develop the skills necessary to obtain the General Class license. Our experience in conducting many thousands of these examinations each year has proven the primary problem for applicants to be difficulty with the telegraphy examination. For this reason, we recommend

Novice Class operators concentrate their amateur radio activities in this area. The amended rules should result in increased operating flexibility which should assist every Novice Class operator in acquiring the necessary telegraphy skills.

18. After consideration of all factors raised in the two petitions, we conclude that the amendments to the Amateur Radio Service Rules as adopted by the Report and Order, FCC 72–849, on September 27, 1972, in Docket 19162 are reasonable and in the public interest. Therefore, in view of the foregoing, IT IS ORDERED, that the two petitions for reconsideration are DENIED, and the amendments to the Amateur Radio Service Rules and Regulations, Part 97, adopted on September 27, 1972, ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R–385

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE BUNKER-RAMO CORP., OAK BROOK, ILL., COMPLAINANT *v.* THE WESTERN UNION TELEGRAPH CO., NEW YORK, N.Y., DEFENDANT	Docket No. 19206

MEMORANDUM OPINION AND ORDER

(Adopted December 15, 1972; Released December 20, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The Review Board has before it an Initial Decision, FCC 71D–95, released December 7, 1971, by Administrative Law Judge Ernest Nash, exceptions, filed by the Chief of the Common Carrier Bureau on January 19, 1972, and by Bunker-Ramo Corporation on January 17, 1972, and a reply brief filed by Western Union Telegraph Company (Western Union) on February 17, 1972. In that Initial Decision, the Presiding Judge held the complainant, Bunker-Ramo Corporation (Bunker-Ramo), in default for refusal to proceed with the hearing, dismissed the complaint and terminated the proceeding. Upon consideration of the record in this proceeding, the Initial Decision and the above-described pleadings, the Board concludes that this matter must be remanded for further hearing.

2. Bunker-Ramo, a corporation engaged in providing brokerage information service,[1] filed a formal complaint against Western Union on June 5, 1970. In that document Bunker-Ramo alleges: that communications facilities to service much of its equipment are provided by Western Union pursuant to published tariffs; that the Commission, in a Memorandum Opinion and Order, FCC 67–1377, 11 FCC 2d 1, permitted Western Union's SICOM tariff (FCC No. 25) to go into effect December 20, 1967; that Western Union, since that date, has actively entered into competition with Bunker-Ramo by offering some services comparable to those offered by Bunker-Ramo; that since Western Union commenced its SICOM service it has failed to provide adequate services to Bunker-Ramo and to others who use Bunker-Ramo's equipment and services; that Western Union has failed to maintain and restore circuits provided to Bunker-Ramo

[1] Bunker-Ramo is a commercial enterprise which, among other things, manufactures and supplies a variety of real-time information, services and display equipment which are used in the brokerage business. The viability of the equipment depends entirely upon adequate and dependable channels of communications which connect the display equipment to the source of information to be displayed.

and its customers within a reasonable time as required by law; and that Western Union has exploited its position as a common carrier to discriminate against Bunker-Ramo and its customers in favor of its SICOM customers.

3. After considering a lengthy series of pleadings which included a petition to make the complaint more specific and an answer to the complaint which consisted of 89 typewritten pages, 19 attachments and a supplement to the answer to the complaint which totaled several hundred typewritten pages, the Commission designated the proceeding for hearing by Memorandum Opinion and Order, FCC 71–390, 28 FCC 2d 617, released April 19, 1971, 36 FR 7617 on the following issues:

I. During the period commencing June 8, 1969 (one year prior to the filing of the complaint) and continuing up to the release date of our Memorandum Opinion and Order herein;

(i) Whether defendant failed to provide interstate or foreign communications service to complainant or complainant's customers upon request therefor, in violation of Section 201(a) of the Act;

(ii) Whether defendant engaged in unjust or unreasonable practices in connection with providing interstate or foreign communication service to complainant or complainant's customers, in violation of Section 201(b) of the Act;

(iii) Whether defendant made any unjust or unreasonable discrimination, preference, advantage, prejudice, or disadvantage in the provision of interstate or foreign communications service to complainant, complainant's customers, and to defendant's SICOM customers, in violation of Section 202(a) of the Act;

(iv) Whether defendant imposed any rates, classifications, or practices applicable to interstate or foreign communications service provided to complainant, complainant's customers, or to defendant's SICOM customers, in violation of Section 203(b) of the Act;

II. Whether complainant is entitled to any monetary damages as a result of any violation of the Act that may be found under issue I hereof and, if so, the nature hereof.

III. Whether the Commission should take further action with respect to any violation of the Act that may be found under issue I hereof and, if so, the nature hereof.

4. The first prehearing conference in this proceeding was scheduled before Administrative Law Judge Ernest Nash, June 8, 1971, almost three months after the designation Order, *supra*, was published. At that conference there was some discussion as to the scope of the issues and the time frame contemplated by those issues within which the case would proceed. The Presiding Judge ruled that the proceeding would be governed by the issues specified by the Commission and that, if Bunker-Ramo had problems with the designation Order, the matter should have been presented to the Review Board. Moreover, the Presiding Judge noted that the time for filing a petition to modify

issues had expired and ruled that the proceeding would not be delayed while Bunker-Ramo took the matter to the Review Board. When pressed for a date on which he could proceed to hearing, counsel for Bunker-Ramo responded that he had a motion for discovery pending, and that if the Review Board acted favorably on the motion to modify the issues which he was about to file, the entire scope of discovery would be different. The Presiding Judge reiterated his observation that the designation Order would prevail and insisted that Bunker-Ramo agree to a date when it could go forward with its case. It was then agreed that the hearing would commence on August 17, 1971. In response to an inquiry by counsel for the Common Carrier Bureau as to the status of Bunker-Ramo's motion for discovery, the Presiding Judge stated:

> I will say this: I have had an opportunity to go through the request for discovery. I think as far as the principles of discovery are concerned, the very generous interpretation placed should pertain. In other words, to the extent that Western Union can respond to these questions, they should respond.

Western Union argued that under the rules discovery should have been completed before the first prehearing conference and that the motion should be denied. The Presiding Judge admonished Western Union to examine the motion which it had just received and to be prepared to state what material it would provide and what it would not. The Judge then noted that Western Union would not be required to respond in writing to Bunker-Ramo's motion for discovery, but could instead make its objections at the next prehearing conference which would convene on June 21, 1971.

5. At the June 21 prehearing conference, Bunker-Ramo's motion for discovery was discussed at great length in light of Western Union's written opposition in which it contended, in essence, that the motion should be denied on grounds of immateriality and irrelevancy, on the ground that compliance would be unduly burdensome, and on the ground of lack of specificity. The Presiding Judge denied Bunker-Ramo's motion for discovery, but admonished Western Union to be cooperative and to supply such material requested by Bunker-Ramo as it could.[2] On June 25, 1971, the Presiding Judge released an Order,

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[2] At page 50, line 8 of the Tr. the Presiding Judge stated:

> I am also operating on the basis that any material which is available, either in the Commission's files or in the files of your adversary in this proceeding, be examined in the Commission's files rather than have the same material made available to you by your opponent.
>
> MR. MEYERS: Are you ruling now, sir, that because some material may, in some form, appear in the Commission's files, therefore we cannot have it from Western Union?
>
> PRESIDING EXAMINER: I said it would be preferable that whatever you have in the Commission's files you examine and copy in the Commission's files. In other words, our files are open and public and available and we have facilities for them to be examined.
>
> Western Union is required by law to file a vast amount of material with the Federal Communications Commission for one purpose, and that is that the public know about certain of their activities that are subject to regulation.
>
> That is what the Commission is here for. One of the purposes of the Commission is to have information about the carriers that they regulate, and if the Commission has the information, I think the place to get it is from the Commission.

At page 67 speaking to Western Union the Presiding Judge said: "I will say this 'Whatever you have kept together and you can make available to him, would you make available to him?' "

At page 77 of the Tr. the Presiding Judge said at line 8:

> To the extent that he is telling you in advance what kind of documents he is going to ask for, I think [it] would also be to your advantage. At this stage of the game we are not here to argue relevancy.

71M–1070, formalizing his ruling denying Bunker-Ramo's motion for discovery; noting the need for cooperation among the parties and referring to "the understandings reached and directions given at the prehearing conference held June 22, 1971". A number of procedural motions were filed following that Order, among them a letter request to reconsider, or in the alternative to permit Bunker-Ramo to appeal the Presiding Judge's ruling on Bunker-Ramo's motion for discovery, and a motion to continue the proceeding until the Review Board had ruled on Bunker-Ramo's motion to modify the issues. Both of these motions were denied by the Presiding Judge in Orders FCC 71M–1227, released July 28, 1971, and FCC 71M–1253, released July 30, 1971, respectively. Bunker-Ramo then filed a petition for waiver of the Commission's Rules and Regulations, and for extraordinary and expedited relief with the Review Board. This petition was dismissed by the Review Board on procedural grounds, FCC 71R–269, released September 3, 1971. Bunker-Ramo's petition for modification of the designation Order was granted in part by the Review Board by Memorandum Opinion and Order, FCC 71R–262, released August 31, 1971, 31 FCC 2d 449. In that document, the Board noted that Bunker-Ramo's petition was filed six weeks late but held that: "In our view resolution of the serious public interest questions raised by complainant's request is fundamental to a fair and complete resolution of this proceeding." The Board modified the designation Order, *supra*, by deleting the time frame limitation from issue I and by adding a new issue IV, to determine:

> Whether defendant has discontinued, reduced or impaired service to a community or part of a community requiring prior certification by the Commission pursuant to Section 214(a) of the Act.

6. The hearing reconvened on September 8, 1971, as ordered by the Presiding Judge. At that session, counsel for Bunker-Ramo advised the Presiding Judge that he could not proceed because the material Western Union had made available to Bunker-Ramo pursuant to the Presiding Judge's "voluntary cooperation procedure" was not adequate and because the issues as modified by the Review Board presented new questions necessitating additional prehearing discovery before his case could properly be prepared. The Presiding Judge declined to examine the material proffered by Western Union and noted that Bunker-Ramo

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And at line 21, the Presiding Judge said: "Mr. Meyers, what you are going to have by July 1st is whatever Western Union can make available to you by July 1st."
And at page 78, line 1, the Presiding Judge said:

> You have made a request of them and I have asked them to accord you the courtesy of responding to your request as much as possible. I am not ordering compliance with the request for the materials contained in your motion for discovery.

The Presiding Judge then noted at line 18 of page 78:

> You understand that in the opinion that the Commission issued in connection with the adoption of its discovery rules, the Commission pointed out that the success or failure of the rules depended, to a large extent, to the cooperative attitude taken by counsel.
>
> Mr. Green, I am sure, will cooperate with you as much as courtesy will allow. He is certainly not going to cooperate with you to make your case. I know that. That is going to be up to you.
>
> To the extent that he has files available that come within the context of your request and he can make them available to you here in Washington, he will make them available to you here in Washington.
>
> If it is too much of a burden to move documents from Hudson Street to Washington, D.C., he will tell you when and where you can go down to Hudson Street to inspect them.

had the burden of proceeding in the case; that he had denied Bunker-Ramo's motion for discovery and that the modified issues did not require further prehearing procedures. He reminded Bunker-Ramo that it had been given a number of continuances and ruled that it must now go forward or at the very least give a day certain on which it would go forward with the proceeding. Bunker-Ramo again responded that it could not move forward without further prehearing procedures on the modified issues. The Common Carrier Bureau supported Bunker-Ramo's position, urging that Western Union must supply much more material to enable Bunker-Ramo to fairly proceed with its case. Western Union urged that it had already provided an enormous amount of material. In response, the Presiding Judge stated at Tr. 115, line 12:

> You say it is an enormous amount and they say it is pitifully inadequate. I am not getting into disputes or determination of this nature.

He thereupon ruled that he would hold Bunker-Ramo in default. To facilitate his preparation of an Initial Decision the Presiding Judge directed the parties to file proposed findings and conclusions. When Bunker-Ramo and the Common Carrier Bureau contended that proposed findings and conclusions were inappropriate, the Judge ruled that in this case they could take the form of briefs of the parties. The Presiding Judge released his Initial Decision, FCC 71D–95, on December 7, 1971, in which he held Bunker-Ramo in default, dismissed Bunker-Ramo's complaint and terminated the proceeding.

7. From the foregoing, it is apparent that the Presiding Judge has misconstrued the purpose of the Commission's prehearing discovery rules and the scope of his discretion under those rules. In the first prehearing conference at page 19 of the transcript he noted:

> You will understand also that, with regard to pretrial procedures, under the Commission's Rules, they are supposed to be completed before the prehearing conference, but that subsequent to the prehearing conference the Examiner may, at his discretion, permit pretrial discovery and interrogatories. I read that to mean that the Examiner, will exercise his discretion with a view toward expediting the hearing. And I will permit pretrial in the form of discovery and interrogatories with a view toward expediting the hearing, but not for the purposes of delay.

From this point forward it was apparent that the Presiding Judge believed that prior to the first prehearing conference the parties were entitled to discovery as a matter of right but that after the first prehearing conference matters of discovery were completely within the discretion of the Presiding Judge.[3] The Review Board, like the Com-

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[3] At page 72, line 16, the Presiding Judge stated:

> You are entitled to have discovery up to June 8th and after June 8th, your right to discovery is a matter of the Examiner's discretion.

And at page 73, line 15, the Presiding Judge stated:

> Mr. Cangelosi, the Commission, by writing the Rule the way it did made it quite clear that it wanted discovery to take place before the prehearing conference. It is because of that Rule that the Chief Examiner has lengthened the time frame between the time he designates an Examiner for a proceeding and the date he sets for the first prehearing conference.
>
> It used to be a matter of two weeks. Now it is six weeks, I think. What happened during all that period of time?

And at page 74, line 6, he said:

> I am not denying him discovery. I am telling Western Union though that they ought to cooperate to the extent that they can cooperate here, otherwise they are

mon Carrier Bureau, is unable to find any basis for this point of view either in the Commission's discovery rules or in the Commission's Report and Order adopting those rules, 11 FCC 2d 185. Section 1.311 (c) of the Commission's Rules makes it clear that, even though discovery is expected to be completed prior to the initial prehearing conference, the Presiding Judge has discretion to:

> . . . at any time order the parties or their attorneys to appear at a conference to consider the proper use of these procedures or the time to be allowed for such use.

Moreover, the Commission in its Report and Order adopting those rules, *supra*, at paragraph 4, page 187 noted:

> Finally, we wish to emphasize that the presiding officer will have full control over the use of these procedures. Under sections 1.311(c) and 1.313, it is within his power to preclude any use, or particular uses, of these procedures in a particular case if he finds that their use will not contribute to the proper conduct of the proceeding, and he has adequate authority to prevent use of the procedures for purposes of delay and to prevent the abuse of parties and witnesses.

We do not find in this language any indication that the responsibility of the Presiding Judge or his discretion with respect to prehearing discovery is any greater after the initial prehearing conference than before that conference and, while the presiding officer has wide discretion in the use of discovery, that discretion is clearly not absolute, and, if that discretion is exceeded, a full and fair hearing can not take place. Furthermore, as noted by the Common Carrier Bureau, the Commission was fully cognizant that the discovery procedures which it was adopting might well delay both the conference and the hearing, but believed that the value of the information sought might well justify extensive use of the procedures in certain cases. We are of the view that this is such a case.

8. The significance of the instant complaint, which alleges discrimination by a common carrier in favor of its wholly-owned competitive subsidiary, involves grave public interest questions which extend far beyond the private rights of Bunker-Ramo and Western Union. As noted by the Commission in its designation Order, *supra*, ". . . the complaint and answer herein raise substantial issues of law and fact [footnote omitted] that should be adjudicated on the basis of a hearing record and initial decision thereon by a Hearing Examiner . . .". Moreover, it is quite apparent that Western Union is the only source of much of the evidence which is essential to a complete record in this proceeding. Furthermore, Western Union has already demonstrated that it cannot be expected to voluntarily disclose pertinent facts and information which it considers to be adverse to its interests.[4] The Presiding Judge's summary denial of Bunker-Ramo's

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going to be forced to do it later on. You see, I can't take statements of counsel as to what may or may not constitute discrimination. I don't have any record of discrimination. You can't tell me all the discriminations practiced by Western Union are peculiarly within Western Union's knowledge. Once the information begins to develop during the course of the hearing we may be able to change our pattern of thinking, but the plain fact is that what we are dealing with here and now is just a question of discovery and a right to discovery as distinguished from the privilege of discovery, which exists up to the date of the prehearing conference. That is the Commission's Rule and no attempt was made by Bunker-Ramo to pursue any discovery during that particular period.

[4] See *Roebling* v. *Anderson*, 257 F.2d 615 (1958), cert. denied 366 U.S. 918 (1961), where the Court held discovery appropriate in a similar circumstance.

motion for discovery arbitrarily prevented it from obtaining the full and fair hearing contemplated by the Commission's designation Order, *supra.* At no point in this proceeding did the Presiding Judge set forth his reasons for denying Bunker-Ramo's motion. In these circumstances, the Review Board has no way of knowing whether the material sought: "appears to be reasonably calculated to lead to the discovery of admissible evidence";[5] whether the documents Bunker-Ramo seeks might be available from sources other than Western Union; or whether Bunker-Ramo would be seriously prejudiced in its attempt to prove its case in the absence of discovery.[6] Furthermore, the Presiding Judge did not rule that any of the 65 categories of documents requested was not sufficiently specific although he implied during the prehearing conference that this might be the case. Nor did he specifically rule that the documents requested were not relevant or material to the proceeding or that the motion was in any other way deficient.[7] Such a disposition in the context of this proceeding was indeed arbitrary and highly prejudicial to the private rights of Bunker-Ramo and the public interest inherent in the resolution of the issues specified by the Commission when this matter was designated for hearing.

9. As noted above, in lieu of formal discovery, the Presiding Judge chose to pursue a procedure which depended upon the voluntary cooperation of the parties. This alternative procedure failed because of Western Union's obvious self-interest in preventing Bunker-Ramo from examining documents which might prove damaging to Western Union's interests. When Bunker-Ramo called this to the Presiding Judge's attention, he refused to concern himself with the problem and assured Bunker-Ramo that all necessary relevant and material evidence could be produced at the hearing.[8] We believe that, having directed a "voluntary procedure", it was the Presiding Judge's responsibility to insure its success. His failure to do so was clearly prejudicial to the compilation of an adequate record in this proceeding. Moreover, after the Review Board had modified the issues, the scope of the proceeding was substantially enlarged and the Presiding Judge's refusal to permit further prehearing procedures in view of the modified issues and to rule on the merits of Bunker-Ramo's motion for discovery predicated upon the modified issues erroneously prevented Bunker-Ramo from adequately preparing its case. Thus, no record concerning the "substantial issues of law and fact" has been compiled and no "initial decision thereon by a Hearing Examiner" has been issued.

10. We infer from the record of the prehearing conferences that the Presiding Judge based his denial of Bunker-Ramo's motion for discovery on the need for what he termed "expedition", although he did not so state in his June 25, 1971, Order formalizing his denial of Bunker-Ramo's motion. If this is so, his understanding of the term

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[5] Section 1.311(b) of the Commission's Rules.
[6] See *Roebling* v. *Anderson, supra.*
[7] See *Southern Broadcasting Company (WGHP–TV)*, 35 FCC 2d 338, 24 RR 2d 548.
[8] Such a procedure would necessarily require Bunker-Ramo to subpoena witnesses and documents. In our view, this would severely limit Bunker-Ramo's ability to obtain all the relevant evidence and would be so cumbersome that the purpose of the discovery rules would be effectively defeated.

fails to take into account the Commission's observation concerning the rules it was then adopting:

> These new rules provide discovery procedures to facilitate preparation, eliminate surprise and to promote fairness. It is hoped that a more thorough preparation will produce a better record and expedite the decision making process. Report and Order by the Commission, *supra* at 186.

It is clear that when the Commission adopted its discovery rules, it contemplated situations such as that now before us, *i.e.*, where one of two adversary parties possesses information essential to the proof of its adversary case.[9] For there would have been no need to create a means of compulsory disclosure if there were no cases where one party would refuse to disclose information essential to its adversary. The Commission having created such rules, they must be administered by the Presiding Judge in a manner that will "facilitate preparation, eliminate surprise and promote fairness." *Cf. Tinker, Inc.*, 4 FCC 2d 372, 7 RR 2d 677 (1966). The Presiding Judge's obvious failure to achieve this result in the instant case clearly prejudiced the rights of Bunker-Ramo and leaves us no choice but to remand the proceeding to the Presiding Judge.[10] In view of the state of the record before us, it appears that the only appropriate procedure is to begin anew.[11]

11. Accordingly, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Ernest Nash, FCC 71D–95, released December 7, 1971, IS SET ASIDE and the exceptions thereto ARE DISMISSED; and

12. IT IS FURTHER ORDERED, That this matter IS REMANDED to the Presiding Judge to be heard *de novo*, on the issues as modified.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[9] See *Fetzer Cable Vision*, 11 FCC 2d 516, modified 12 FCC 2d 28 (1968).

[10] See *Roebling* v. *Anderson*, *supra* at 619, where Judge Fahy, speaking for the Court, stated:

> Though appellate courts will generally not interfere with a trial court's disposition of matters of discovery, they will do so when the ruling is "improvident and affect[s] the substantial rights of the parties". *Carter* v. *Baltimore & O.R.*, 80 U.S. App. D.C. 257, 259, 152 F.2d 129, 131.

[11] The Board has noted Bunker-Ramo's suggestion that the ends of justice might best be served by assigning the proceeding to a different Administrative Law Judge. In our view, such drastic action is not required by the record before us.

109-023—73——2

F.C.C. 72R-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, D.B.A. CHAPMAN RADIO AND TELEVISION CO., HOMEWOOD, ALA.	Docket No. 15461 File No. BPCT-3282
ALABAMA TELEVISION, INC., BIRMINGHAM, ALA.	Docket No. 16760 File No. BPCT-3706
BIRMINGHAM BROADCASTING CO., BIRMINGHAM, ALA.	Docket No. 16761 File No. BPCT-3707
For Construction Permit for New Television Broadcast Station	
BIRMINGHAM TELEVISION CORP. (WBMG), BIRMINGHAM, ALA.	Docket No. 16758 File No. BPCT-3663
For Modification of Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted December 19, 1972; Released December 21, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. This proceeding involves the applications of Chapman Radio and Television Company (Chapman), Alabama Television, Inc. (Alabama Television), Birmingham Broadcasting Company (BBC) and Birmingham Television Corporation (WBMG), for authorization to construct a new UHF television broadcast station.[1] Presently before the Review Board for consideration are: (1) a petition to enlarge issues, filed October 13, 1972, by BBC; [2] and (2) a petition to enlarge issues and other relief, filed October 31, 1972, by BBC.[3]

2. Subsequent to the last remand for further hearing in this proceeding, Alabama Television responded to written interrogatories which had been posed by the Broadcast Bureau. In Alabama Television's response, dated September 18, 1972, the applicant indicated for the first time that one of its principals and directors, J. George

[1] The following is a brief recitation of the history of this proceeding. The proceeding was designated for hearing by Order, FCC 66-636, released July 20, 1966. On August 30, 1968, the Presiding Law Judge released an Initial Decision (19 FCC 2d 185, 14 RR 2d 6), recommending a grant of the application of Alabama Television under the comparative issue. The Review Board affirmed the Judge's ultimate resolution of the proceeding (19 FCC 2d 157, 17 RR 2d 60, reconsideration denied 20 FCC 2d 556, 17 RR 2d 1028). By Order, FCC 70-744, 24 FCC 2d 282, released July 13, 1970, the Commission, *inter alia*, granted a petition for enlargement of issues; the proceeding was thus remanded to the Presiding Judge for the preparation of a Supplemental Initial Decision.

[2] Other related pleadings before the Board for consideration are: (1) opposition, filed October 24, 1972, by Alabama Television; (2) Broadcast Bureau's comments, filed October 26, 1972; (3) reply (comments), filed October 30, 1972, by WBMG; and (4) reply, filed October 31, 1972, by BBC.

[3] Other related pleadings before the Board for consideration are: (1) opposition, filed November 13, 1972, by Alabama Television; (2) Broadcast Bureau's opposition, filed November 15, 1972; (3) reply (comments), filed November 17, 1972, by WBMG; and (4) reply, filed December 1, 1972, by BBC.

Mitnick, owns 12.5% of Live Lines, Inc., a cable television system which commenced operation in Jasper, Alabama, in 1969. In light of this disclosure, BBC filed the October 13 petition to enlarge issues, seeking five separate issues[4] relating to the newly disclosed information.[5] In opposition, Alabama Television made additional disclosures. The applicant revealed that three of its principals (including Mitnick) each own a 12.5% interest in Live Lines, Inc. Thereupon, BBC filed the October 31 petition to enlarge issues and other relief[6] seeking, *inter alia*, a candor issue against Alabama Television.

3. The belated disclosures[7] of the CATV ownership interests held by two directors and a minority shareholder of Alabama Television could have serious implications for this proceeding. As an initial matter, a Section 1.65 issue is clearly warranted. Rule 1.65 requires disclosure when information furnished in an application is no longer accurate and complete in all significant respects,[8] or when changes, which may be of decisional significance, have occurred.[9] The argument that Alabama Television did not realize that such information was of significance is disingenuous at best; not only does this information clearly fall into the category of "those kinds of matters which may be decisionally significant" (see *Reporting of Changed Circumstances, supra*), it was precisely the "kind of matter" which formed the basis for the Review Board's Decision granting Alabama Television's application. In short, Alabama Television was granted a comparative preference over other applicants under the diversifica-

[4] BBC seeks the addition of the following issues:

1. To determine the ownership interest of Live Lines, Inc. and whether or not any of Alabama Television's (sic) Inc. principals are also principals of Live Lines, Inc. or have ever been principals of Live Lines, Inc.

2. To determine, in light of the Commission's Rules Section 76.501 whether Alabama Television, Inc. is qualified to own and operate a television broadcasting station whose Grade A coverage covers the territory of Live Lines, Inc.'s franchise.

3. To determine, the effect upon Alabama Television, Inc.'s preference over other applicants in the comparative aspect of this proceeding regarding Dissemination of Media Control.

4. To determine, all of the facts and circumstances surrounding Alabama Television, Inc.'s failures to report J. George Mitnick's and John Bankhead's ownership interest in Live Lines, Inc. in violation of the Commission's Rules, and the effect, if any, upon the comparative or qualifying standing of Alabama Television, Inc.

5. To determine, all of the facts and circumstances surrounding Live Lines, Inc. failure to file timely Federal Communications Commission Form 325 and 326 and the effect, if any, upon the comparative or qualifying standing of Alabama Television, Inc.

[5] Although the petitions are late filed, the Board is of the view that they raise serious questions of substantial public importance. We agree with the Broadcast Bureau that the absence of supporting affidavits is not critical, because the alleged facts are derived from Commission records and are conceded by Alabama Television.

[6] BBC requests four alternative forms of relief in the following order:

(1) To dismiss Alabama Television's application; or

(2) To certify the subject matter to the Commission with the Board's recommendation of dismissal; or

(3) To direct the Broadcast Bureau to institute a Section 403 inquiry; or

(4) To specify a lack of candor issue against Alabama Television.

The first three requests may be readily dismissed. The Review Board perceives no basis for dismissing Alabama Television's application, and, in any event, request for dismissal should be addressed to the Presiding Judge in the first instance. Moreover, the Board has no jurisdiction to institute a Section 403 inquiry. Finally, the request for certification is also unwarranted, since the questions presented by the petitioner are neither novel nor do they present problems of such a magnitude as to require certification. *Chronicle Broadcasting Company*, 21 FCC 2d 263, 18 RR 2d 183 (1970).

[7] Since the interests in Live Lines, Inc. did not exist prior to the filing of Alabama Television's application, a Rule 1.514 issue is unwarranted.

[8] BBC requested an issue inquiring into other possible financial connections between Alabama Television and Live Lines, Inc. In view of the further information furnished by Alabama Television with its opposition, however, we do not believe that there is basis for adding this issue.

[9] See *Reporting of Changed Circumstances Affecting Applications*, FCC 64-1047, 3 RR 2d 1622.

tion criterion of the comparative issue.[10] *Chapman Radio and Television Company*, 19 FCC 2d 157, 17 RR 2d 60 (1969). The language employed by both the Administrative Law Judge and the Review Board in their various decisions constitutes clear and unequivocal notice of the significance of the undisclosed information. Thus, although a separate candor issue is not required, the Board is constrained to point out that the questions of concealment and intent, given these circumstances, merit the closest scrutiny under a Section 1.65 issue. *Southern Broadcasting Company (WGHP–TV)*, FCC 72R–73, 33 FCC 2d 1044, 23 RR 2d 1197. Finally, if it is determined that Rule 1.65 has been violated, but that disqualification is unwarranted, the Administrative Law Judge should reevaluate the applicants under the comparative issue in light of this violation.

4. BBC's remaining two requests for additional issues will be denied. Petitioner has made no showing, whatsoever, which would suggest that the alleged failure of Live Lines, Inc. to file certain forms with the Commission bears directly upon the qualifications of Alabama Television to be a Commission licensee. BBC's request for a cross ownership issue is we believe, premature since the ownership interests in both Live Lines, Inc. and Alabama Television were in existence before July 1, 1970. The provisions of Section 76.501 of the Rules[11] are not effective until August 10, 1973, as to proscribed ownership interests if such interests were in existence on or before July 1, 1970.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 13, 1972, by Birmingham Broadcasting Company, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine whether Alabama Television, Inc. has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes in its application, and, if not, the effect of such non-compliance on the basic or comparative qualifications of the applicant to be a broadcast licensee; and

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence SHALL BE on Birmingham Broadcasting Company, and the burden of proof under this issue SHALL BE on Alabama Television, Inc.; and

8. IT IS FURTHER ORDERED, That the petition to enlarge issues and other relief, filed October 31, 1972, by Birmingham Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[10] In this connection we note that a CATV interest represents an interest in existing media of mass communications (see *e.g., Media, Inc.*, 22 FCC 2d 875, 18 RR 2d 1175 (1970); *Lake Erie Broadcasting Co.*, 34 FCC 2d 354, 24 RR 2d 64 (1972); and *William R. Gaston*, 35 FCC 2d 624, 24 RR 2d 779 (1972); and that in comparative broadcast hearings both common control and less than controlling interests in other broadcast stations and other media of mass communications will be considered. (*Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965)).

[11] Section 76.501 of the Rules prohibits a cable television system from carrying the signal of *any* television broadcast station if such system directly or indirectly owns, operates, controls or has an interest in a television broadcast station whose Grade B contour overlaps the CATV service area.

F.C.C. 73R-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, D.B.A. CHAPMAN RADIO AND TELEVISION CO., HOMEWOOD, ALA.	Docket No. 15461 File No. BPCT-3282
ALABAMA TELEVISION, INC., BIRMINGHAM, ALA.	Docket No. 16760 File No. BPCT-3706
BIRMINGHAM BROADCASTING CO., BIRMINGHAM, ALA.	Docket No. 16761 File No. BPCT-3707
For Construction Permit for New Television Broadcast Station.	
BIRMINGHAM TELEVISION CORP. (WBMG), BIRMINGHAM, ALA.	Docket No. 16758 File No. BPCT-3663
For Modification of Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1973; Released January 10, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for hearing by Order, FCC 66-636, released July 20, 1966. Presently before the Review Board is a joint petition to enlarge issues,[1] filed November 28, 1972, by Birmingham Television Corporation (WBMG) and Alabama Television, Inc., requesting an issue to determine whether Birmingham Broadcasting Company (BBC) possesses the requisite character qualifications to be a Commission licensee.[2]

2. A character qualifications issue will be added. As petitioners note, a final criminal conviction was entered in the U.S. Court of Appeals for the Fifth Circuit against Oscar E. Hyde, a principal of BBC, for multiple violations of Section 1951 of Title 18 of the U.S. Code.[3] Violation of federal law, either by an applicant or one of its principals, on its face, raises a sufficient question regarding character to merit careful examination in order to determine whether an applicant is

[1] Other related pleadings before the Board for consideration are: (a) opposition, filed December 11, 1972, by BBC; (b) Broadcast Bureau's comments, filed December 12, 1972; and (c) reply, filed December 15, 1972, by WBMG.

[2] The Board notes that the joint petition is untimely and that petitioners have failed to show good cause for their tardiness. However, in view of the serious public interest questions raised by the allegations, the joint petition shall be considered. See *Medford Broadcasters, Inc. (KDOV)*, 18 FCC 2d 699, 16 RR 2d 900 (1969); *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[3] In a previous Memorandum Opinion and Order, 7 FCC 2d 461, 9 RR 2d 727 (1967), the Board held that it was preferable to await the final outcome of the criminal proceeding against Hyde and to impose a condition on a possible grant of BBC's application, rather than to specify issues against the applicant. However, since the conviction has become final, there is no further impediment to specifying a character issue against BBC.

qualified to operate a broadcast station in the public interest.[4] Contrary to BBC's assertions, Hyde's belated attempts to disassociate himself and his unlawful conduct from the corporate applicant do not affect our determination, since he remains a principal of the applicant.[5]

3. Accordingly, IT IS ORDERED, That joint petition to enlarge issues, filed November 28, 1972, by Birmingham Television Corporation (WBMG) and Alabama Television, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

4. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following:

To determine in light of the conviction of Oscar E. Hyde for violations of 18 U.S.C. § 1951, whether Oscar E. Hyde and Birmingham Broadcasting Company are qualified to own and operate a television broadcast station in Birmingham, Alabama; and

5. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence SHALL BE on Birmingham Television Corporation (WBMG) and Alabama Television, Inc., and the burden of proof under this issue SHALL BE on Birmingham Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] See *Report on Uniform Policy as to Violation by Applicants of Laws of the United States*, 1 RR Part 3, 91:495 (1951).

[5] In this connection, the Board notes that the BBC amendments reflecting Hyde's resignation as officer and director of BBC, and the divestiture and transfer of his 26.7% stock interest in the applicant were refused by the Presiding Judge by Memorandum Opinions and Orders, FCC 67M–122, released January 24, 1967, and FCC 70M–1411, released October 14, 1970. The Board also notes its agreement with the Broadcast Bureau that the issue need not encompass a determination of all the facts and circumstances surrounding the conviction since they have already been adjudicated by an appropriate court.

F.C.C. 73R-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ELBERT DEAN, AND GEORGE E. GAUTNEY AND CARL T. JONES, A PARTNERSHIP, D.B.A. CLOVIS BROADCASTERS, CLOVIS, CALIF. For Construction Permit	Docket No. 13995 File No. BP-12728

MEMORANDUM OPINION AND ORDER

(Adopted January 11, 1973; Released January 16, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER NOT PARTICIPATING.

1. Before the Review Board for consideration is a petition to enlarge issues, filed November 15, 1972, in which the remaining applicant in this proceeding requests an issue to determine whether good cause exists for the waiver of Section 1.569(b)(2)(i) of the Commission's Rules.[1]

2. The above-captioned application was designated for hearing by Order, FCC 61-353, released March 20, 1961. However, because of the pendency of the Clear Channel Proceedings instituted shortly thereafter in 1961, this proceeding was held in abeyance. In response to an order to show cause (FCC 72M-700), released by the Administrative Law Judge on May 26, 1972, the applicant stated its intention to prosecute its application. Subsequently, in accordance with an agreement reached during a prehearing conference, the applicant submitted a comprehensive amendment which, *inter alia*, reflects a change to establish a directional antenna system; in connection with this portion of the amendment, the applicant requested a waiver of Section 1.569(b)(2)(i) of the Commission's Rules.[2] By Order, FCC 72M-1425, released November 16, 1972, the Presiding Judge accepted the amendment. However, because the Presiding Officer is not authorized to waive the requirements of Commission Rules unless an appropriate issue looking toward waiver has been added to the proceeding, the applicant, at the suggestion of the Broadcast Bureau, filed the instant petition.

3. An issue looking toward waiver of Section 1.569(b)(2)(i) of the Commission's Rules will be added. Petitioner states that, although its transmitter site is located outside the 500 mile extension of the 0.5 mv/m-50% nighttime contour of Class I-A station WBAP, Fort

[1] Also before the Board for consideration is the Broadcast Bureau's comments, filed November 22, 1972.

[2] Section 1.569(b)(2)(i) provides that applications for frequencies adjacent to Class I-A channels will be accepted for filing and acted upon provided they show, with respect to all Class I-A channels within 30 kHz of the designated frequency, that the proposed transmitter site is located inside the area encompassed by a 500 mile extension of the 0.5 mv/m-50% nighttime contour of Class I-A stations on unduplicated channels.

Worth, Texas, this non-compliance with Section 1.569(b)(2)(i) is purely technical in nature; and that because of the required protection to Station KGO, San Francisco, California, no Class II–A station operating on 820 kHz could be located in an area close enough to the proposed station to involve any prohibited overlap of contours.[3] These uncontested allegations, warrant the addition of an issue to determine whether the requirements of Section 1.569(b)(2)(i) of the Commission's Rules should be waived in this proceeding. See *Peter L. Pratt*, 16 FCC2d 967, 15 RR 2d 933 (1969); *Blue Ridge Broadcasting Co., Inc.*, FCC 72–128, 23 RR 2d 887 (1972).

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed November 15, 1972, by Clovis Broadcasters IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

5. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following:

To determine whether the proposal of Clovis Broadcasters violate the provision of Section 1.569(b)(2)(i) of the Commission's Rules, and, if so, whether good cause exists for waiver of the provisions of said Section; and

6. IT IS FURTHER ORDERED, That the burdens of proceeding with the introduction of evidence and proof under the issue added herein SHALL BE on Clovis Broadcasters.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] Station KGO operates on 810 kHz, which is only 10 kHz removed from Station WBAP; additionally, the 0.5 mv/m contour of KGO encompasses the proposed site at Clovis, California.

F.C.C. 72-1188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AN APPLICATION FOR CERTIFICATE OF COMPLIANCE FILED BY COLUMBUS COMMUNICATIONS CORP., COLUMBUS, IND.	CAC-25 IN001

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN, AND ROBERT E. LEE DISSENTING; COMMISSIONER JOHNSON NOT PARTICIPATING; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. Columbus Communications Corporation operates a cable television system in Columbus, Indiana, a community located in the Indianapolis-Bloomington, Indiana television market (#16). The system now provides its subscribers with the following television signals:

WLWI (ABC, Ch. 13), Indianapolis, Indiana.
WISH-TV (CBS, Ch. 8), Indianapolis, Indiana.
WRTV (NBC, Ch. 6), Indianapolis, Indiana.
WURD (Ind., Ch. 40), Indianapolis, Indiana.
WTTV (Ind., Ch. 4), Bloomington, Indiana.
WTIU (ETV., Ch. 30), Bloomington, Indiana.
WAVE-TV (NBC, Ch. 3), Louisville, Kentucky.
WHAS-TV (CBS, Ch. 11), Louisville, Kentucky.
WLKY (ABC, Ch. 32), Louisville, Kentucky.

On March 15, 1972, Columbus Communications filed, and subsequently amended, an application for a Certificate of Compliance requesting certification of its proposal to add the following broadcast stations:

WGN-TV (Ind., Ch. 9), Chicago, Illinois.
WXIX (Ind., Ch. 19), Cincinnati, Ohio.

Oppositions to this application were filed on May 12, 1972 by Indiana Broadcasting Corporation, licensee of WISH-TV, Indianapolis, Indiana, and McGraw-Hill Broadcasting Company, Inc., licensee of WRTV, Indianapolis, Indiana.[1]

2. Columbus Communications presently operates a twelve-channel capacity cable system. It carries nine grandfathered television signals and for some time has provided local originations. With the addition of two independent stations to its carriage, Columbus Communications will utilize all twelve channels. The carriage of these stations as re-

[1] WRTV was formerly operated under call letters WFBM-TV. Sale of the station to McGraw-Hill Broadcasting Company by Time-Life Broadcast, Inc. was approved by the Commission on March 8, 1972.

quested is consistent with the signal carriage provisions of the rules. A major market cable system operating prior to March 31, 1972 and wishing to add two distant independent signals to its carriage must also provide public and educational access channels (see Section 76.251(c)). Columbus Communications has proposed to fulfill its access obligations by the use of certain cable channels made available either on those numerous occasions when our exclusivity rules forbid the carriage of duplicative network programming, or when stations normally carried are not broadcasting.

3. Objecting parties take exception to this "shared-channel" access plan.[2] They maintain that the Commission's rules require the system to provide one separate, exclusive channel in order to meet each of its public access and educational access obligations. Indiana Broadcasting Corporation refers to our statement that ". . . for each additional broadcast signal carried, such a system will have to provide one access channel,"[3] and insists that this provision (and the related Section 76.251(c) of our Rules) must be interpreted as calling for a channel dedicated exclusively for a particular access use. Indiana Broadcasting Corporation also suggests that Columbus Communications' shared access proposals will result in subscriber confusion because viewers will not know when, or on what channel, to expect either broadcast or access programming.

4. Because of our exclusivity rules and the program schedules of certain stations carried by Columbus Communications, it appears that the system will have large amounts of channel time available for non-broadcast uses. And we do not question the cable company's good faith in attempting to meet its access obligations in the manner proposed. Nevertheless, we are not persuaded that our goals in this area would be fulfilled by the proposed variance from Section 76.251(c). The Commission has determined that access services will best be stimulated by the setting aside of specially designated channels, since such a procedure will foster public identification with a specific channel and will insure its availability for the designated access purpose. Though access cablecasting is still in its infancy, we have been presented no information to suggest that our policy embodied in Section 76.251(c) is incorrect.

5. It appears from Columbus Communications' present channel capacity that if it adds only one additional television signal, it will be able to provide public access cablecasting on an exclusive channel, and will thereby fully comply with our rules.[4] Hence, we will certify

[2] On April 21, 1972, Indiana Broadcasting Corporation (licensee of WISH–TV) requested Columbus Communications Corporation to provide WISH–TV and all other local stations the exclusivity protection to which they would be entitled. McGraw-Hill has joined in this request. We note that such an open ended request, of course, lacks the specificity required by our rules. On May 3, 1972 Columbus Communications Corporation acknowledged the "request" and informed Indiana Broadcasting Corporation that upon a proper request for exclusivity, it would indeed comply with the Commission's rules. The objecting parties have requested that we condition the grant of this application by foreclosing the opportunity for subsequent dispute on this matter. We decline to take this course. We assume, in light of Columbus Communications Corporation's response to Indiana Broadcasting Corporation, that it will upon proper request, abide by our Rules. Neither objecting party has suggested that this will not be the case.

[3] Paragraph 89 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, FCC 72–530, 37 Fed. Reg. 13848, 13864 (1972).

[4] Under Section 76.251(c), if only one signal is added, only a single cablecasting channel need be provided.

one of the two signals requested by Columbus Communications, and will allow the system to select the signal. A certificate of compliance will be issued when Columbus Communications advises the Commission of its choice.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–25), filed by Columbus Communications Corporation, IS GRANTED to the extent reflected herein, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

F.C.C. 72-1177

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (DUBLIN AND ATLANTA, GEORGIA; STARKVILLE, MISSISSIPPI; HELENA, ARKANSAS)	Docket No. 19551 RM-1821, RM-1864, RM-1923, RM-1978

FIRST REPORT AND ORDER

(Adopted December 20, 1972; Released December 27, 1972)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making, released July 24, 1972 (37 Fed. Reg. 15320) proposing an amendment of Section 73.202(b) of the Rules, the Table of FM Assignments.[1] The rule making proceeding was instituted on the basis of four petitions for assignment of FM channels to communities which were either conflicting or linked with one of the other proposals. Subsequent to the issuance of the Notice, six other petitions were consolidated into the proceeding as counterproposals. This Report and Order concerns only the petition for a change in the assignment at Helena, Arkansas, RM-1978. At a later date, a Report and Order will be issued on the remaining petitions.

2. The Notice observed that the operation of Station KCRI licensed to Radio Helena Incorporated, on Channel 298, was causing second harmonic interference in the Helena, Arkansas area to the reception of the television signal of a Memphis, Tennessee, station operating on Channel 13. It appeared that although Radio Helena had taken corrective steps to rectify the interference problems, none of the steps proved effective. In the face of an economic boycott, the station reduced its radiated power from 48.8 kilowatts to 1.2 kilowatts, but some problems still remained. Since another Class C channel was not available for Helena, Radio Helena requested substitution of Channel 276A for Channel 298. However, this required a change in the assignment at Clarksdale, Mississippi, from Channel 276A to Channel 292A which coincided with part of an Atlanta, Georgia, package of proposed changes. The Radio Helena petition was thus made a part of this rule making proceeding. In addition, since Radio Helena wished to continue operating from its present site, and since on the basis of the information then filed the distance separation from the proposed channel would be short-spaced less than one mile to Station WREC-FM,

[1] Also there is a motion to sever and request for immediate grant filed October 20, 1972, by Radio Helena, Incorporated, licensee of Station KCRI(FM), Helena, Arkansas. Since the action to be taken herein would not prejudice the proposals filed by other parties to the proceeding, we will grant the motion.

Memphis, Tennessee, operating on Channel 274, it requested a waiver of the rule. In its motion to sever, Radio Helena stated that it had furnished incorrect coordinates for its transmitter site. The distance, based on the corrected information, shows that the KCRI site would meet the minimum mileage separation requirement to Station WREC–FM. Thus, no further consideration need be given to the request for a waiver of the rule.

3. We believe that it would be in the public interest to sever the proposal for Helena, Arkansas, from other proposals in this proceeding, and grant the petition for substitution of an FM assignment. The connecting link of the Helena proposal with the Atlanta package of proposed changes is Clarksdale, Mississippi. If Channel 292A were to be substituted for Channel 276A at Clarksdale, the change there would not affect the assignment at Oxford, Mississippi—either the present or the proposed assignment. Oxford is presently assigned Channel 248 and would be changed to Channel 278 by the Atlanta proposal, which in turn requires a change at Clarksdale to Channel 292A. The severance and grant of the Helena proposal therefore would not affect whatever action that may be taken later on the Atlanta proposal. Further, the adoption of the proposed change in the assignment at Helena would provide immediate relief to Station KCRI from its limited power operation.

4. There is one other matter which must be taken into consideration. The proposal in RM–1978 was to delete Channel 298 at Helena, Arkansas, and substitute Channel 276A therefor. To accomplish this change, the Notice herein also proposed substitution of Channel 292A for Channel 276A at Clarksdale, Mississippi. In passing, the Notice mentioned that the deletion of Channel 298 at Helena would make it free for use elsewhere, and it was noted that the petitioner for the change at Helena mentioned Stuttgart, Arkansas, as a likely location. (See *Policy to Govern the Change of FM Channels to Avoid Interference to Television Reception*, Public Notice, FCC 66–106, February 3, 1966). However, the Notice (released July 24, 1972) did not contain a proposal to assign Channel 298 to Stuttgart. On July 21, 1972, Carroll D. Caldwell filed a petition for rule making (RM–2020) to assign Channel 295 to Little Rock, Arkansas, a proposal which would conflict with assignment of Channel 298 to Stuttgart. Through error, in a Public Notice released August 4, 1972 (FCC Report No. 825), it was announced, pursuant to our cutoff procedures in FM rule making proceedings, that RM–2020 would be considered as a counterproposal in this docket. In a Public Notice (FCC No. 833) released October 2, 1972, we corrected that error by announcing that RM–2020 would not be considered in this docket. The basis for this was that, since there was no outstanding proposal to assign Channel 298 to Stuttgart, it was improper to associate RM–2020 with this docket as a counterproposal.

5. Mr. Caldwell on October 17, 1972, filed a petition for reconsideration of the October 2 action urging, among other things, that comments have been filed in this proceeding going to the merits of his Little Rock proposal and that to remove RM–2020 from this docket will cause Mr. Caldwell to suffer a delay of many months before it again reaches the

procedural posture that it had in this proceeding. The short answer to this is that the Caldwell petition (RM–2020) was erroneously injected into this docket and we see no reason why it should be retained, especially since an opposition filed against it raises problems the solution of which could unduly delay a final disposition of RM–1978 concerning Helena.[2] Accordingly, the petition for reconsideration will be denied. When the Caldwell petition for rule making is acted on, all filings directed at it when it was filed, or filed as comments in the present docket will be taken into consideration.

6. The authority for the actions taken herein is contained in Sections 4(i), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, That effective February 2, 1973, the Table of FM Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the cities listed below to read as follows:

City	*Channel No.*
Helena, Arkansas	276A
Clarksdale, Mississippi	269A, 292A

8. IT IS FURTHER ORDERED, That effective February 2, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by Radio Helena, Incorporated, for Station KCRI(FM), Helena, Arkansas, IS MODIFIED to specify operation on Channel 276A in lieu of Channel 298 subject to the following conditions:

(a) The licensee shall inform the Commission in writing by no later than January 15, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by February 2, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station KCRI(FM) on Channel 276A, at Helena, Arkansas.

(c) The licensee may continue to operate on Channel 298 under its outstanding authorization until it is ready to operate on the new frequency. Within 30 days of commencing operation on Channel 276A, the licensee shall submit measurement data of the sort normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 276A without prior authorization from the Commission.

9. IT IS FURTHER ORDERED, That the motion to sever and request for immediate grant filed October 20, 1972, by Radio Helena, Incorporated, IS GRANTED, and

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed October 17, 1972, by Carroll D. Caldwell IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[2] Mr. Caldwell will not be penalized as his petition will receive action in turn based on its original filing date.

F.C.C. 73-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO POSSIBLE USE OF RADIO COMMUNICATIONS TO ENHANCE SAFETY ON THE HIGHWAYS	Docket No. 17049 RM-732

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. This proceeding was initiated in 1966 (Notice of Inquiry, 31 FR 16380, December 22, 1966) to obtain information and views as to whether, and if so how, radio communications could be employed to enhance safety on the highways. A number of interested parties submitted views and proposals, and some of the suggested methodology has been implemented by us. For example, in a separate proceeding in Docket No. 18705, we reserved "Channel 9" in the Citizens Band for emergency use, including the reporting of automobile accidents and hazardous road situations. Then, in Docket No. 18267, we adopted technical and operating standards for emergency radio call box systems, situated along highways, using frequencies in the 72–76 MHz band. Further, in Docket 17228, we made a "splinter" (7.5 kHz) channel available in the 150 MHz band in the Local Government Radio Service for use in providing emergency call box service. More recently, in rule making in Docket No. 19001, we made four frequency pairs in the 450–470 MHz range available for fixed station operation for highway emergency radio systems.

2. While these steps were taken in furthering the objectives of the inquiry, we do not feel its continuation would serve a useful purpose. Moreover, we are keeping abreast of current developments relating to possible future highway communication systems. This matter is being studied at this time, and we anticipate that these studies will lead eventually to further rule making or inquiry better designed to evaluate these new concepts. As we have mentioned, however, this inquiry has served its purpose and may now be closed.

3. In taking this action, it is also appropriate to dispose of the associated petition of the Automobile Manufacturers Association, Inc., (AMA) to institute rule making to establish a "Highway Emergency Locating Plan Service." For essentially the same reasons given for terminating our inquiry in this docket, we conclude that AMA's petition must be denied.

4. Accordingly, IT IS ORDERED, That the above-referenced petition for rule making, filed by the Automobile Manufacturers Association, Inc., IS DENIED; and IT IS FURTHER ORDERED, That the inquiry in Docket No. 17049 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of INDUSTRIAL BUSINESS CORP., OGALLALA, NEBR. OGALLALA BROADCASTING CO., INC., OGALLALA, NEBR. For Construction Permits	Docket No. 19559 File No. BPH-7317 Docket No. 19560 File No. BPH-7364

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER CONCURRING IN RESULT.

1. Now before the Review Board is a petition to enlarge issues, filed August 25, 1972, by Ogallala Broadcasting Company, Inc. (OBC),[1] which requests the addition of issues to determine: (1) whether Industrial Business Corporation (Industrial) will proceed with the construction and operation of its proposed FM station in the event the Commission were to allocate and authorize operation of an additional FM channel, as well as (2) whether there are sufficient advertising revenues to support Industrial's proposed operation in the event of such an allocation or in competition with existing operations.[2]

2. OBC, in addition to its application in this proceeding, has also filed a petition for rule making requesting allocation of an additional FM channel to Ogallala, Nebraska.[3] In its present petition, OBC notes that Industrial opposed its petition for rule making, alleging, *inter alia*, that such an allocation would threaten Industrial's proposed operation of an independently operated FM station in Ogallala, and that there are not sufficient advertising revenues in Ogallala to support Industrial's proposed station if a second FM channel were allocated to Ogallala. OBC then estimates that additional revenues available from its proposed FM operation would be approximately $11,000 per year and therefore concludes, on the basis of Industrial's opposition to its petition for rule making, that "any circumstance which would reduce actual or potential revenues of Industrial by $11,000 of annual revenues would cause the demise of the Industrial operation." OBC

[1] OBC is also presently the licensee of AM Station KOGA, located in Ogallala, Nebraska.
[2] The Review Board has before it the following pleadings: (a) petition for enlargement of issues, filed August 25, 1972, by OBC; (b) opposition, filed September 7, 1972, by the Broadcast Bureau; (c) opposition, filed September 14, 1972, by Industrial; and (d) reply, filed October 3, 1972, by OBC.
[3] The petition for rule making has been assigned File No. RM-1970.

109-023—73——3

also argues that Industrial's actions in regard to the petition for rule making violate that portion of Industrial's application which provides that "it is not filed for the purpose of impeding, obstructing or delaying determination on any other application with which it may be in conflict."

3. The Review Board will deny the requested issues. As indicated above, the petitioner here is (a) the licensee of AM Station KOGA, Ogallala, Nebraska; (b) one of the two conflicting applicants for the Class A FM station to be operated on Channel 228 involved in the subject proceeding; and (c) the proponent in a separate rulemaking proceeding for the allocation of an additional FM channel at Ogallala, Nebraska. This proposal for an additional frequency has been opposed by Industrial, the other applicant seeking Channel 228 in this proceeding, because the market, according to Industrial, cannot support three stations. The Board believes that petitioner's request here is wholly devoid of merit on its face. First, the subject of the instant adjudicatory proceeding is Ogallala's second station, and the questions of whether that market can support a third station and/or whether Industrial is financially qualified to operate this second station in the speculative event that a third is authorized are irrelevant to the subject proceeding. Obviously, neither we, nor the petitioner, can reasonably predict the outcome of the rulemaking proceeding, and even assuming that it is successful and a third frequency is allocated, neither we, nor the petitioner, can predict the likelihood of its success in becoming the licensee of that third frequency. For these reasons, it is our view that petitioner's request here is not only grounded on sheer speculation, it is devoid of any cogent reasons for the relief requested. Moreover, there is no conflict between Industrial's position in the rulemaking proceeding, and its application in this proceeding. For it is clear that Industrial has a right to oppose the allocation of an additional frequency to Ogallala,[4] and having such a right it borders on the frivolous for petitioner to assert that Industrial's opposition to the allocation of an additional frequency in the rulemaking proceeding violates that portion of Industrial's application which provides that "it is not filed for the purpose of impeding, obstructing or delaying determination on any other application with which it may be in conflict."

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed August 25, 1972, by Ogallala Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] *Cf. Carroll Broadcasting Company* v. *FCC*, 102 U.S. App. D.C. 346, 258 F.2d 440 (1958).

F.C.C. 72-1058

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of INTERMEDIA, INC. (ASSIGNOR) and ROBERT P. INGRAM, TRADING AS KBEA BROADCASTING CO. (ASSIGNEE) For Assignment of License of Station KBEA, Mission, Kans., and Station KBEY-FM, Kansas City, Mo.	File No. BAL-7689, BALH-1777, BASCA-546

ORDER

(Adopted November 22, 1972; Released December 21, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The assignee is fully qualified.

2. The assignor acquired control of the licenses of Stations KBEA and KBEY-FM on July 15, 1970. The instant application was filed on August 30, 1972. Therefore, the subject application is governed by the Commission's Three Year Rule, Section 1.597. In a separate application, which was granted the same day, KBEY-FM is being "spun-off" to KBEY, Inc. (BALH-1735). Intermedia has requested a waiver of this rule.

3. In support of its request for waiver of the "Three Year Rules" Intermedia represents that: (1) It is a subsidiary of SCI Industries, Inc. a publicly held corporation; (2) that it is also the licensee of Station KQTV-TV, St. Joseph, Missouri, KLYX-FM, Clear Lake City, Texas and KGRV-FM, St. Louis, Missouri; (3) that due to sustained losses in all broadcast operations the Board of Directors of SCI voted to dispose of all broadcasts interests and retire from the broadcast industry permanently; and (4) no profit will be made from the sale of Stations KBEA and KBEY-FM; since its total investments in these stations $979,167[1] and the sale price is $950,000.

4. Based on the foregoing representations, particularly SCI's determination to withdraw permanently from the broadcast field and Intermedia's showing that no profit will be made on this transaction, we find no evidence of trafficking and therefore a waiver of the hear-

[1] The $979,167 investment is comprised of the following: Cost of Acquisition $750,000, Improvements $189,000 and home office expense $40,165.

ing requirements of Section 1.597 of our Rules would be appropriate.

5. In view of the foregoing we find that a grant of this application will serve the public interest, convenience and necessity. Accordingly, it is ORDERED that the subject application is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1164

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Applications of JOHN WOLFE ENTERPRISES, INC. For Renewal of Licenses for Business Radio Station KHS-67 and KHS-68 and VALLEY CABLE TELEVISION CORPORATION For Reinstatement of Licenses for Business Radio Station KHS-67 and KHS-68	File Nos. 23349/23350-IB-61X File Nos. 30695/30696-IB-62X

ORDER

(Adopted December 20, 1972; Released January 2, 1973)

BY THE COMMISSION:

1. The above-captioned applications have been filed by John Wolfe Enterprises, Inc. (Wolfe Enterprises) and Valley Cable Television Corporation, respectively, for renewal and reinstatement of the licenses for Business Radio Stations KHS-67 and KHS-68. The facilities in question operate in the 12,200-12, 700 MHz band and are used to relay the signals of television stations in Salt Lake City, Utah, to a cable television system serving over 500 subscribers residing in the area of Mountain Home, Idaho (1970 U.S. Census population, 6,451).

2. At present, the ownership of the assets of Valley Cable, the company presently operating the cable television system, is the subject of litigation in the District Court of the Fourth Judicial District of the State of Idaho (Case No. 3612). Therefore, we feel it is appropriate to postpone action on the applications until after the ownership question has been resolved by the state courts. On the other hand, we believe that the public interest requires that we provide for continued cable television service to the subscribers of the cable system. This can be done most appropriately by granting to Valley Cable Television Corporation interim authorizations allowing continued operations of the microwave system.[1] We want to be clear, however, that our action is not to be taken as reflecting any way on the merits of the case before the state courts or on the merits of the applications before us and it will be without prejudice to any action we may finally take on the applications.

[1] The original authorizations were issued to Valley Cable Television Corporation, the operator of the cable television system. These authorizations were later assigned to John P. Wolfe Enterprises, of which Valley Cable is a subsidiary. The authorizations, however, expired on February 1, 1972 and since then the microwave system has been operated under temporary authorizations granted by the Chief, Safety and Special Radio Services Bureau under delegated authority.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 309(a) of the Communication Act of 1934, as amended, That Valley Cable Television Corporation is granted interim authorizations pending final action on the subject application to operate station KHS–67 and KHS–68 in accordance with the rules governing the Business Radio Service and in exact compliance with the terms of the former authorization therefor; IT IS FURTHER ORDERED, That within 10 days after the decision of the District Court of the Fourth Judicial District of the State of Idaho on the question of ownership of the assets of the Valley Cable Television Corporation becomes final, applicants shall submit to the Commission a copy of that decision along with any other pertinent information and amendment to the applications as may be appropriate.

FEDERAL COMMUNICATION COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE REPORT ON A STUDY OF LAND MOBILE SPECTRUM UTILIZATION PREPARED FOR THE COMMISSION BY THE STANFORD RESEARCH INSTITUTE	Docket No. 18732

ORDER TERMINATING PROCEEDING

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. This proceeding was initiated in 1969 by our Notice of Inquiry (34 FR 18488, November 11, 1969). In this notice, we invited interested persons to submit comments, views, and information relevant to matters covered by the reports of the Stanford Research Institute on its study of land mobile spectrum utilization.

2. A number of comments were filed. They were evaluated by us, and the material set out in them has been considered by us in the development of our current spectrum management programs. This was the purpose of the inquiry; and that purpose having been served, it is appropriate to conclude the proceeding.

3. Accordingly, IT IS ORDERED, That the proceeding in Docket No. 18732 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72–1186

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of LARAMIE COMMUNITY TELEVISION, HERMOSA, WYO. For a Construction Permit in the Cable Television Relay Service.	BPCAR–247

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION:

1. Pending before the Commission is an application for a construction permit in the Cable Television Relay Service (Part 78 of the Commission's Rules) by Laramie Community Television (Laramie), operator of a cable television system in Laramie, Wyoming. Laramie indicates that it has been carrying the signals of Television Stations KBTV, KOA–TV, KLZ–TV and KRMA–TV of Denver, Colorado and KFBC–TV of Cheyenne, Wyoming off-the-air for many years and that the microwave facilities applied for would be used to improve reception of these stations.

2. Harriscope Broadcasting Corporation, licensee of Station KTWO–TV, Casper, Wyoming filed a petition to deny the application. KTWO–TV, which is also carried on the Laramie cable television system, urges that a radio station authorization not be granted to improve reception of out-of-state television signals unless any such authorization is conditioned upon carriage of KTWO–TV "on equal basis, from a quality standpoint." Harriscope states that while KTWO–TV primarily undertakes to serve Casper and surrounding areas, it also broadcasts programming of general appeal to the entire state of Wyoming. A number of cases are cited as indicating a Commission policy favoring carriage of in-state television signals on cable television systems.[1]

3. Frontier Broadcasting Company, licensee of Television Station KFBC–TV, Cheyenne, Wyoming also filed a pleading responsive to the application, requesting that it be granted only on the express condition that the applicant not provide the signals of any of the Denver stations sooner than it provides the signal of station KFBC–TV and that it be prohibited from carrying these signals except during periods when it receives by microwave the signal of KFBC–TV without material degradation. Frontier additionally asks that the applica-

[1] These include *Mohican TV Cable Corp.*, 16 RR 2d 1158 (1969); *Cass Community Antenna TV, Inc.*, 22 FCC 2d 257 (1970); and *Cablevision of Muskogee*, 24 FCC 2d 706 (1970).

tion not be granted until it is amended to assure that a clear and unobstructed signal from KFBC–TV is available at the receiving site or a satisfactory engineering showing is made that the specified site will enable the applicant to carry KFBC–TV without degradation. In an engineering statement submitted with Frontier's petition a number of questions are raised as to the suitability of the site in light of the nature of the propagation path between the KFBC–TV antenna and the CAR station transmitter site.

4. Laramie Community Television responded to the Harriscope petition by questioning its standing to participate in this proceeding. KTWO–TV, it is said, will not be injured by the proposal since KTWO–TV does not serve Laramie, which is approximately 35 miles beyond the KTWO–TV grade B contour. In light of the fact that all of the signals involved, including that of KTWO–TV, have been carried on the system for many years, the arguments in favor of carriage of in-state programming are not thought to be relevant. In responding to the Frontier Broadcasting Company petition, Laramie denies that the site selected is not suitable for the reception of KFBC–TV and pledges to commence microwave carriage of KFBC–TV "in no event later than the initiation of the Denver feeds." With respect to the suitability of the site selected, an affidavit was submitted by applicant's District Manager indicating that for a period of one year signal availability at the site was observed and signal strengths recorded. The affidavit concludes that all channels, including that of KFBC–TV, "appeared noise-free and of excellent quality on the TV receiver to all parties viewing the signal." In a further attempt to show that the site is suitable, applicant submitted a supplementary pleading containing additional signal strength measurements. Laramie indicates that the site was carefully selected and that it is convinced that an excellent KFBC–TV signal can be obtained at that point.

5. Replying to the additional information supplied concerning the antenna site, Frontier states that the affidavits submitted are wholly inadequate as a basis for an independent evaluation of the site. Although questioning whether the adequacy of the site can be judged from the data supplied by the applicant, Frontier does not state directly that the site is not adequate or that it has attempted, on other than a theoretical basis, to determine the receivability of the KFBC–TV signal at the site.

6. Laramie, Wyoming is a community of approximately 22,000 persons located in southeastern Wyoming. It is about 40 miles from Cheyenne, 150 miles from Casper, and 115 miles from Denver which are the closest communities to which television stations are licensed. Laramie Community Television has been operating a cable television system in Laramie since 1954 and carries off-the-air five television stations from Denver, one from Cheyenne, and one from Casper. The Cheyenne station, KFBC–TV, is the only station placing a Grade B or better contour over the community. Although not required to do so by the Commission's Rules, Laramie has filed the captioned application in an effort to improve reception of five of these signals.[2] Pleadings

[2] A common carrier microwave application is pending to improve reception of KWGN–TV, Denver and another application in the CAR service is pending to improve reception of KTWO–TV, Casper.

responsive to this application by Harriscope Broadcasting and Frontier Broadcasting seek to assure that the signals of their stations in Casper and Cheyenne have technical equality on the system with the Denver stations. With respect to the petition to deny filed by Harriscope Broadcasting, we note that subsequent to the Harriscope pleadings in this proceeding Laramie filed an application for a Cable Television Relay Station (CPCAR–390) which it has prosecuted in good faith and which is designed to achieve the objective of affording comparable picture quality to KTWO–TV. We have today granted the application. This effectively moots the Harriscope petition to deny.[3]

7. Laramie has also sought to improve reception of Station KFBC–TV from Cheyenne and the question raised with respect to that aspect of its application by Frontier Broadcasting involves the suitability of the reception site and the question of who, as between the cable television system operator and the television station licensee, is responsible for proving that the site is suitable. The dispute essentially involves a conflict between Frontier's theoretical study and the applicant's field observations. While apparently not disputing the fact that the site might be suitable, Frontier seeks to cast upon the applicant the burden of proving that it is suitable. Although the suitability of the site selected is not completely without doubt, we do not believe that the application should be denied on that ground. Rather we believe the appropriate way to proceed is to grant the application on the condition that if the site proves unsuitable to supply a signal adequate to comply with the picture quality standards prescribed in our cable television rules (Part 76, Subpart K), new facilities will be applied for at a more suitable site. We believe this is an appropriate method of proceeding both because it is a far surer method of testing the site than could ever be achieved by a contest between experts in a hearing room and because there seems to be no doubt that authorization of these facilities will lead to some immediate improvement in picture quality even if it is eventually determined that other facilities or a different site are necessary. With this condition and with the understanding that equality will be maintained, insofar as possible between the Denver stations and the Cheyenne station, the application will be granted.

Accordingly, IT IS ORDERED, That the "Petition to Deny" filed March 1, 1971 by Harriscope Broadcasting Corporation and the "Petition of Frontier Broadcasting Company for Imposition of Conditions or Other Relief" filed March 1, 1971 ARE GRANTED to the extent reflected herein and are otherwise DENIED.

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[3] It should also be noted that the policies and precedents relied on by Harriscope had their derivation in the "leapfrogging" proposals set forth in the *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417 (1968). In contrast to the rules proposed, the rules finally adopted do not apply these policies against "leapfrogging" to areas, such as Laramie, that are outside of all television markets. See *Cable Television Report and Order*, 36 FCC 2d 141 (1972) and *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 327, paras. 24 *et seq.* (1972).

IT IS FURTHER ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 78.1, *et seq.*, of the Commission's Rules that the above-captioned IS GRANTED on the condition that if the facilities are not adequate to provide a signal from Television Station KFBC–TV, channel 5, Cheyenne, Wyoming in compliance with Part 76, Subpart K of the Commission's Rules, new facilities adequate to insure compliance with Part 76, Subjart K will be applied for.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

F.C.C. 72-1191

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re MEMPHIS CATV, INC., MEMPHIS, TENN. For Certificate of Compliance	CAC-865 TNO63

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE, AND REID CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. On July 17, 1972, Memphis CATV, Inc., filed an application for a Certificate of Compliance to begin cable television service in Memphis, Tennessee (the 26th largest television market). Companion applications were submitted for Shelby County, Tennessee; DeSoto County, Mississippi; and West Memphis, Arkansas. Memphis CATV proposed the following signal carriage (as amended):

WHBQ-TV (ABC), Memphis, Tennessee.
WMC-TV (NBC), Memphis, Tennessee.
WREC-TV (CBS), Memphis, Tennessee.
WKNO-TV (Educ.), Memphis, Tennessee.
KPLR-TV (Ind.), St. Louis, Missouri.
KDNL-TV (Ind.), St. Louis, Missouri.
WDXR-TV (Ind.), Paducah, Kentucky.

The system would be constructed with a 26 channel capacity, providing separate public access, educational and local government channels in Memphis. Additionally, the cable television franchise acquired by Memphis CATV and rules governing the use of these access channels were submitted with the application. On December 5, 1972, the Chief, Cable Television Bureau, having determined that these applications were unopposed and consistent with the cable television rules, and that the franchise submitted with these applications substantially complied with Section 76.31 of the Rules, granted the applications pursuant to his delegated authority.[1]

2. By letter dated December 7, 1972, Memphis City Councilman Thomas H. Todd informed the Cable Television Bureau that he had earlier submitted a letter protesting a grant of the Memphis CATV application upon his receipt of a copy of that application. This letter, dated July 24, 1972, referred to Councilman Todd's earlier corre-

[1] Section 0.289(c)(12) of the Rules authorizes the Chief, Cable Television Bureau, to "act on applications for certificates of compliance which conform to applicable rules and regulations, and are either unopposed or whose disposition is governed by established Commission policy."

spondence with the Cable Television Bureau in which he noted several disparities between certain features of the franchise and the new cable television rules. In its reply of March 13, 1972, the Bureau stated that it was "safe to say that the franchise . . . will have to be renegotiated prior to any Commission issuance of a certificate of compliance under the new Cable Television rules." Councilman Todd's July letter asserted the Memphis cable television franchise was "no more in compliance now than when you received my letter of February 16, 1972 . . ." Councilman Todd protested the Bureau's action "with all the vehemence I can muster." Acknowledging the possibility that the application may have been erroneously granted, the Cable Television Bureau rescinded its grant on December 14, 1972, and the matter is now before the Commission for our disposition.

3. At the outset, it is appropriate to note that Councilman Todd's opinion of the validity of the franchise is not shared by the Mayor of Memphis. In a letter to the Cable Television Bureau dated December 8, 1972, Mayor Wyeth Chandler stated that "neither City Councilman Tom Todd nor any individual has any authority to make any protest or request for rehearing on behalf of the City of Memphis." The Mayor advised the Bureau that Memphis CATV had agreed to many amendments to its franchises suggested by the City Attorney stating that "we expect a completion of negotiations shortly." However, it is unnecessary to enter this particular political thicket to resolve the issue of the franchise's acceptability under our rules. The Commission, in the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972) and in several recent decisions [2] has determined that cable television franchises awarded prior to the effective date of the new cable television rules will be processed if they are in substantial compliance with the thrust of these rules.

4. On June 30, 1969, Memphis CATV, Inc. was awarded a franchise to operate a cable television system in the City of Memphis. The franchise, initially awarded for thirty years, requires the cable system to pay an annual fee of three percent of gross operating revenues when the system has 25,000 or fewer customers; a four percent fee when between 25,000 and 50,000 customers are served by the system; and a five percent fee when over 50,000 customers are served. Construction of the system must commence within eighteen months of any change in the Federal Communications Commission's rules which permit the carriage of distant television signals into Memphis. In its application, Memphis CATV asserts that this franchise was awarded pursuant to public proceedings and that a local business office will be maintained in Memphis. Additionally, procedures to investigate and resolve subcriber complaints are specified. Judged against the criteria the Commission has formulated in *CATV of Rockford, Inc., supra*, and applied in other cases, we are satisfied that this franchise substantially complies with the requirements of the cable television rules. A short-term Commission authorization until March 31, 1977 should

[2] *CATV of Rockford, Inc.*,——FCC 2d——(1972), FCC 72-1008, is, of course, the most notable decision in this area.

assure both the applicant and the City of Memphis that the franchise under which the system operates will be in full compliance with our rules on or before this date.

Accordingly, IT IS ORDERED, That the application for Certificate of Compliance filed by Memphis CATV, Inc. IS GRANTED.

IT IS ALSO ORDERED, That the opposition filed by Councilman Thomas H. Todd on December 7, 1972 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MIDWEST CORP., MICROWAVE RELAY SERVICES, INC. and TWO-WAY RADIO OF CAROLINA, INC. For Construction Permits in the Multipoint Distribution Service for a New Station at Charlotte, N.C.	Files Nos. 5047–C5–P–72, 6582–C5–P–72, and 4639–C5–P–72
MIDWEST CORPORATION and NORTH STATE SIGNAL, INC. For Construction Permits in the Multipoint Distribution Service for a New Station at Winston-Salem, N.C.	Files Nos. 5049–C5–P–72, and 7326–C5–P–72
MR. HOWARD S. KLOTZ AND MR. WILLIAM CORBUS, MICROWAVE RELAY SERVICES, INC., MULTI-COMMUNICATIONS SERVICES, INC., MIDWEST CORP., JACKSONVILLE TV SIGNAL CO. and W. L. AND R. L. MEADOW D.B.A. JACKSONVILLE RADIO DISPATCH SERVICE For Construction Permits in the Multipoint Distribution Service for a New Station at Jacksonville, Fla.	Files Nos. 5582–C5–P–72, 6102–C5–P–72, 7939–C5–P–72, 7941–C5–P–72, 7940–C5–P–72, 7669–C5–P–72

MEMORADUM OPINION AND ORDER

(Adopted January 3, 1973; Released January 5, 1973)

BY THE COMMISSION:

1. The three groups of applications captioned above propose the construction of omnidirectional microwave stations in the Multipoint Distribution Service (MDS).[1] Those of the first group seek to build a new microwave station at Charlotte, North Carolina, and consist of: Midwest Corporation (Midwest) filed February 8, 1972; Microwave Relay Services, Inc. (MRS) filed March 24, 1972; and Two Way Radio of Carolina, Inc. (Two Way) filed January 24, 1972. Those of the second group seek to build a new station at Winston-Salem, North

[1] Technically the applications were filed in the Point to Point Microwave Radio Service, but the Commission has proposed to shift the omnidirectional frequencies allocated to MDS in the rule making in Docket No. 19493 (34 FCC 2d 719).

Carolina, and consist of: Midwest, filed February 8, 1972, and North State Signal, Inc., (North State) filed April 11, 1972. Those of the third group seek to build a station at Jacksonville, Florida and consist of: Howard S. Klotz and William Corbus (Klotz-Corbus), filed February 24, 1972; MRS, filed March 7, 1972; Multi-Communications Services, Inc. (MCS) filed May 5, 1972; Midwest, filed May 5, 1972; Jacksonville TV Signal Company (Jacksonville TV), filed May 5, 1972; and Jacksonville Radio Dispatch Service (Jacksonville Radio) filed April 18, 1972. The applications of each group appear to be mutually exclusive with each other by reason of electrical interference.

2. The Commission has before it petitions filed by Two Way, North State and Jacksonville Radio (Petitioners) filed on July 7, August 9 and August 15, 1972 to dismiss and return as defective their rival applications. Oppositions were filed by Midwest, MRS, Klotz-Corbus, MCS and Jacksonville TV (Respondents) and replies by Petitioners. All of the petitions and responses raised substantially identical issues and are therefore treated together.

3. Petitioners submit copies of a letter dated June 23, 1972 from the North Carolina Utilities Commission and one dated July 31, 1972 from the Florida Public Service Commission. Both of these letters, in effect, indicate that the states are asserting regulatory jurisdiction over intrastate common carrier services provided over omnidirectional microwave facilities. Petitioners have submitted copies of state certificates with their applications and now urge that their competitors' applications be dismissed for failure to comply with Section 21.15 (c) (4) of the Commission's rules, which requires that copies of any necessary state authorization be submitted with a radio application. Among others, petitioners cite *Two-Way Radio of Carolina, Inc.*, 18 FCC 2d 356 (1969), and *Canaveral Communications*, 24 FCC 2d 279 (1970), as precedents. Respondents claim: (a) that the proposed service is primarily interstate in nature, similar to that of specialized common carriers, and that state authorization should not be initially required; (b) that by reason of *Pacific Telatronics, Inc.*, 4 RR 2d 145 (1964), state jurisdiction is preempted; and (c) that the state commissions did not request the return of the applications.

4. Section 2(a) [47 U.S.C. 152(a)] of the Communications Act of 1934, gives the Commission exclusive jurisdiction over all interstate communications, but Section 2(b) generally exempts from our regulation, except for radio authority, a carrier's intrastate operations. Where a carrier's operations may be both interstate and intrastate in nature, we may authorize radio facilities to provide interstate operation without state certification for the intrastate portion, if it appears that interstate traffic alone would warrant construction of the facilities. Thus have many specialized carriers been authorized, e.g. *MCI New York West*, 35 FCC 2d 98 (1972), *Microwave Communications, Inc.*, 6 Pike & Fisher Radio Regulations 2d 952, 954 (1966).

5. As petitioners contend, Section 21.15(c)(4) does provide that any application in the Domestic Public Radio Services must include "where required by applicable local law, a certified copy of the franchise or other authorization issued by appropriate regulatory

authorities." As a matter of policy this rule has been closely adhered to in the past.[2] In *Two-Way Radio of Carolina, Inc., supra*, we held that where an applicant had applied for and been denied a clearly required state certificate, his failure to submit such a certificate necessitated the return of the application as defective. Similarly, in *Canaveral Communications, supra*, we upheld the return of an application where the applicant had misunderstood existing state law and failed to apply for state authorization. However, both of these cases involved applicants proposing to provide service that was purely intrastate or local exchange in character.[3]

6. The character of MDS is significantly different. It involves the transmission of a customer's closed circuit television signal (or other information) from a central location to a multiplicity of customer selected points. Contrary to respondent's argument, MDS is not interstate merely because a television signal is being transmitted. In *Pacific Telatronics, Inc., supra*, we held that state authorization was not required where the microwave carrier's facilities were entirely within a single state, but the service involved was the transmission of broadcast television signals. It was stated that the Commission has sole jurisdiction under Title II of the Act because the carrier's service was an extension of, and incidental to, broadcasting, a service inherently interstate in nature. However, the closed circuit signals transmitted over MDS facilities are in a somewhat different category. Therefore, absent other circumstances, to be classed as interstate communications the transmission of an MDS station must be received by a customer in another state, or the MDS station must be part of a line of communication originating in another state.[4]

7. In analyzing the intended use of these facilities, we note a variety of approaches. On the one hand, MRS states that it intends to file, or has filed, applications for MDS in numerous Florida, Georgia and South Carolina cities which will be interconnected via existing microwave systems to provide regional distribution capability for such potential uses as: movie/entertainment distribution to hotels; industrial uses such as management addresses, sales training, intracorporate conferences, new product introduction, and transmission of credit information; educational uses for school systems, medical and graduate education; and facsimile transmission such as business facsimile delivery, money order transmission, check clearance and weather reporting. On the other hand, Two Way and Jacksonville Radio seem to envision a primarily local service-local distribution of instructional packages and closed circuit visual communications for hospitals, doctors, police, fire departments and schools. The other applicants contemplate similar uses without discussion as to whether they would be primarily interstate or intrastate in nature. Midwest, North State, MRS, and

[2] Whether a state commission requested the dismissal of an application or not, has not (and is not) considered relevant to the disposition of the application under the rule.

[3] Section 221(b) of the Communications Act essentially excludes from Commission Title II jurisdiction all local exchange service even though it constitutes a portion of interstate or foreign line of communication.

[4] The fact that the film, tape or other information to be relayed was transported in interstate commerce prior to being delivered to the carrier is not sufficient, in itself, to establish it as an interstate communication. *See Goldman* v. *United States*, 316 U.S. 129 (1942).

Jacksonville TV state in their pleadings that their operations will be substantially interstate.

8. Looking beyond the instant applications there appears to be an even greater emphasis on interstate uses in other proposals. We note that Microband Corporation of America (itself an applicant in 33 cities) has announced that about 110 MDS applicants (of some 320) have agreed to join a national MDS system to be interconnected through use of the intercity video links of AT&T and the facilities of various microwave common carriers. Microband envisions interstate corporations to be their primary market and estimates that it will develop interstate usage of approximately 8–10 hours per day. Microband claims to have made agreements with applicants Charlotte, Winston-Salem, and Jacksonville, the cities involved here. While not particularly applicable to these applications, we note that a number of MDS applications have proposed stations in cities near state borders (e.g. Newark, New Jersey and New York City) which are likely to involve service to customers in an adjacent state. Also, while the television signals to be transmitted are closed circuit in nature, they are possibly interrelated to the Commission's responsibility for regulation of broadcast television and cable television. *See Notice of Proposed Rulemaking* in Docket No. 19493, 39 FCC 2d 719 (1972). Thus, viewing MDS as a whole, we conclude that it is likely to generate services with a high degree of federal interest.

9. Our primary obligation, of course, is our obligation to regulate interstate common carrier communications services as provided for under Title II of the Communications Act of 1934. We recognize that MDS will provide intrastate service, perhaps predominantly in its early development, but it also appears that a substantial portion of the service to be rendered will include the transmission of closed circuit video and other communications between the states. Therefore, in view of this and the unique characteristics of MDS, we believe that the Commission should retain full control over the selection of the licensees where interstate service is to be involved. Accordingly, under such circumstances we, as a matter of policy, will not require an applicant to obtain a state certificate prior to making application for or receiving an authorization in this service. However, if interstate service is not initially anticipated, such a certificate will continue to be a prerequisite if it is required by the State. This policy is somewhat similar to that applied in the case of specialized common carriers, and it in no way interferes with a state's right to regulate the rendition of purely intrastate services. However, we wish to make it clear that this policy is restricted to MDS. Section 21.15(c)(4) of the Rules will be applied to all other Part 21 services pursuant to pre-existing policy. As to respondents' applications, we note that they project the rendition of interstate communications by interconnection with other carriers and are therefore consistent with this new policy.

10. Accordingly, IT IS HEREBY ORDERED that the aforementioned petitions to dismiss ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72D-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WILLIAM B. NEAL (KQYX) For Construction Permit	JOPLIN, Mo.	Docket No. 19482 File No. BP-18480

APPEARANCES

Leo Resnick, Esq. and *Simon Tucker, Esq.*, on behalf of William B. Neal; *Robert E. Levine, Esq., John H. Midlen, Sr., Esq.*, and *James A. Gammon, Esq.*, on behalf of Gary Acker and Billy Wolfe, d/b as A-W Broadcasting Company; *Robert E. Levine, Esq., John H. Midlen, Sr., Esq.* and *Leonard S. Joyce, Esq.*, on behalf of Charles Burton, Paul L. Bradshaw, Don Burrell, Jerry Carter and Joseph H. Pyle, d/b as Queen City Broadcasting Company; *John H. Midlen, Sr., Esq.* and *Robert E. Levine, Esq.*, on behalf of Gary Acker, Billy Wolfe, Charles Burton, Paul L. Bradshaw and Don Burrell, d/b as Queen City Broadcasting Company; and *Jay L. Witkin, Esq.* and *John T. Kelly, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAY A. KYLE

(Issued November 1, 1972; Effective December 26, 1972, pursuant to Section 1.276 of the Commission's Rules)

Preliminary Statement

1. This proceeding involves the application of William B. Neal for an increase in power for Station KQYX, Joplin, Missouri. At the present time KQYX operates daytime only on 1560 kHz with 250 watts power and a non-directional antenna. In this proceeding William B. Neal seeks to increase the power of the station to 10 kw and to install a directional antenna.

2. The Commission, by a Memorandum Opinion and Order (FCC 72-282), released March 29, 1972, designated the Neal application along with the applications of Gary Acker and Billy Wolfe, d/b as A-W Broadcasting Company (Docket No. 19480) and Charles Burton, Paul L. Bradshaw, Don Burrell, Jerry Carter and Joseph H. Pyle d/b as Queen City Broadcasting Company (Docket No. 19481) for a consolidated hearing as the two Springfield applications were mutually exclusive with the Neal application for Joplin, Missouri. A-W Broadcasting Company and Queen City were both seeking to operate, *inter alia*, on 1550 kHz at Springfield, Missouri. Subsequently,

certain of the partners in the two Springfield applications formed a new entity known as the Queen City Broadcasting Company.

3. At a prehearing conference on August 30, 1972, the application for the old Queen City Broadcasting Company in Docket 19481 was dismissed by the Administrative Law Judge because of the formation of the new Queen City company just above referred to.

4. On September 1, 1972 Neal filed a petition requesting severance of his application from the consolidated proceedings which was informally granted at a hearing on October 3, 1972 and formalized by an order released October 18, 1972 (FCC 72M–1303). Prehearing conferences were held on the entire matters here involved on May 16, August 30, and October 3, 1972. The evidentiary hearing on the Neal application was also held on October 3, 1972 and the record closed on that date. Proposed findings of fact and conclusions of law were filed on behalf of William B. Neal on October 16, 1972.

Findings of Fact

5. William B. Neal, the licensee of KQYX, Joplin, Missouri, presently operates daytime only on 1560 kHz with 250 watts power and a non-directional antenna. Through the application here under consideration, Neal seeks to increase the power of his Joplin station to 10 kw and to install a directional antenna. At the evidentiary hearing on October 3, 1972 there was offered and received in evidence as Neal Exhibit 1, an engineering report containing a detailed resume and an analysis of field intensity measurements taken on Station KQYX, Joplin, Missouri, in the direction of Springfield, Missouri.

6. This Neal exhibit, which was received in evidence without objection, clearly indicates that there is no objectionable interference with the engineering proposal of the Neal application and that of the application in Docket No. 19480, Springfield, Missouri referred to in paragraph 2, *supra*. Neal Exhibit 1 was also the basis for the petition for severance filed by Neal on September 1, 1972.

7. The Commission in its designation order provides that in the event the Neal application is granted that said grant would be subject to a condition which is referred to below and made a part of the ordering clause.

8. Counsel for the Commission's Broadcast Bureau, the only other party in this proceeding, has informally advised the Administrative Law Judge that the Bureau entertains no objection to a grant of the application here under consideration.

Conclusions

1. The licensee, William B. Neal, here seeks to increase the power of Station KQYX at Joplin, Missouri to 10 kw and to install a directional antenna. At the present time KQYX operates daytime only on 1560 kHz with 250 watts and a non-directional antenna.

2. From the evidence offered and received in this proceeding, it is clear that a grant of the instant application will not cause objection-

able interference to the new Queen City broadcasting station at Springfield, Missouri proposed in Docket No. 19480.

3. In view of the foregoing findings of fact and conclusions of law and upon careful evaluation of the entire record in this proceeding, it is concluded that a grant of the application of William B. Neal to increase the power of Radio Station KQYX, Joplin, Missouri, to 10 kw and to install a directional antenna will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by the applicant or the Commission reveiws the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, the application of William B. Neal to increase the power of Station KQYX, Joplin, Missouri, to 10 kw and to install a directional antenna IS GRANTED, subject to the following condition:

Permittee shall assume responsibility for the installation and adjustment of filter circuits or other equipment in the antenna system of the proposed operation and any existing station which may be necessary to prevent adverse effects due to internal cross-modulation and reradiation.

JAY A. KYLE,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 72-1168

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re PAXTON COMMUNITY ANTENNA SYSTEM, INC. PAXTON, ILL. For Certificate of Compliance	CAC-216 IL116

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE AND WILEY CONCURRING IN THE RESULT.

1. On April 20, 1972, Paxton Community Antenna System, Inc., filed an application for a certificate of compliance (CAC-216) to operate a cable television system at Paxton, Illinois, a town of approximately 4,400 persons located in the 64th television market. Paxton intends to provide the following Illinois television signals: WCIA (CBS), Champaign; WICD (NBC), Champaign; WILL-TV (Educ.), Urbana; WAND (ABC), Decatur; WGN-TV (Ind.), Chicago; WTTW (Educ.), Chicago; WFLD-TV (Ind.), Chicago; and WICS (NBC), Springfield.

2. Paxton's application is opposed by Plains Television Corporation, licensee of Television Broadcast Station WICD, Champaign, Illinois; Midwest Television Inc., licensee of Television Broadcast Station WCIA, Champaign, Illinois; and WFIL, Inc., licensee of Television Broadcast Station WAND, Decatur, Illinois. Additionally, there is a dispute involving the Illinois Commerce Commission which is ruled on below.

3. WFIL objected only to the proposed carriage of WMAQ, WLS-TV and WTWO, and Plains Television and Midwest Television also objected to their carriage. Paxton amended its application to drop its request for these signals and therefore mooted WFIL's objection and partially mooted Plains' and Midwest's objections.

4. In its objection, Plains argues that Paxton's franchise is inconsistent with Section 76.31 of the Commission's Rules on the following grounds: the franchise has a 10 year renewal option; it lacks procedures for handling service complaints; there is question about the adequacy of the procedures established to regulate subscribers' rates; and whether—in light of the improved technology available to cable television systems—the City Council's decision finding Paxton Community technically capable of operating the system is valid. Additionally, Plains argues that the Commission should await resolution of the appeal of *Midwest Video Corp.* v. *United States*, 441 F. 2d 1322 (8th Cir., 1971).

5. Midwest objects to Paxton's franchise on a number of grounds: it questions the 10 year franchise renewal option; the handling of service complaints, and the City Council's power to set rates. Further, Midwest argues that: the trunk line construction program does not meet the requirements of Section 76.31(a)(2) of the Rules; that pursuant to Section 76.31(a)(6) of the Rules the franchise does not provide for incorporation into the franchise of modification resulting from Commission amendments; that the franchise fee—although within the Commission's 3% guideline—is based on gross receipts which is a larger base than gross subscriber revenues; that the application fails to explain how it will meet the access and other nonbroadcast requirements of Section 76.251 of the Rules; and that Paxton has not given assurances that it will comply with the Commission's program exclusivity and syndicated exclusivity requirements.

6. Plains' and Midwest's arguments involved alleged inconsistencies with the franchising requirements of Section 76.31 of the Rules. Paxton was awarded its franchise on July 13, 1964, so that its consistency with Commission requirements is governed by Par. 115, *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972). Therein, we modified Section 76.31 of the Rules so that nonconforming franchises granted prior to March 31, 1972, will be processed so long as there is substantial compliance with our new rules, *CATV of Rockford*, FCC 72–1005, —FCC 2d—. Although the franchise ordinance does not state that it was awarded after a public hearing which considered the applicant's qualifications, it appears these matters were considered by the Paxton City Council. Nor is there any positive indication that the applicant is no longer technically capable. Similarly, the franchisee states that it will provide for the prompt and equitable handling of service complaints, and pursuant to Section 76.31(a)(6) of the Rules will comply with any modification of Section 76.31 of the Rules not inconsistent with its franchise or—if modifications are inconsistent—seek a change in its franchise within the proper time period. The franchise provisions regarding rate changes provide for consideration by the City Council and subject the determination of rates to any state or Federal laws or regulations. The franchise fee ranges from 1% the first three years to 3% the last nine years of the franchise and appears to be within our standards. (In this case, we take the franchise term "recurring monthly charges" to mean charges based on subscriber revenues.) The franchise also provides that the franchisee shall commence service in its franchise area within a reasonable amount of time and diligently pursue construction so that those who desire cable service receive it. The franchise's initial length of 15 years (of which 8 years have elapsed) although coupled with a possible 10 year renewal option is of no serious consequence since the franchise must be renegotiated by March 31, 1977, to conform fully with the Commission's rules. In light of these considerations, it appears that the franchise meets the substantial compliance test, *CATV of Rockford*, *supra*, and that the public interest would not be served by requiring Paxton to renegotiate now with the franchisor.

7. Midwest's argument that Paxton has failed to explain how it will meet the requirement for the availability and administration of

access and other nonbroadcast cable services does not seem justified by the information contained in Paxton's application which sets forth Paxton's recognition of its responsibilities in this area and its affirmative willingness to discharge them. Midwest does not suggest what greater showing could be undertaken. With regard to the program and syndicated exclusivity requirements of Sections 76.93 and 76.151 of the rules, cable systems are expected to comply with these requirements; however, the certificating process does not contain any requirement that cable systems affirmatively agree to comply with these rules. Finally, Plains' argument involving *Midwest Video* has been mooted by the Supreme Court's recent decision upholding the Commission's authority to require cable television program origination. *United States* v. *Midwest Video Corp.*, — U.S. — (Case No. 71–506) decided June 7, 1972.

8. On May 5, 1972, an Order was issued by the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois (Order No. 71–2983) ruling that from "that date, no Illinois cable system has authority to operate under State law unless it had already engaged in substantial construction of its system or is in receipt of a valid waiver from the Illinois Commerce Commission." Paxton Community Antenna System, Inc. has received no such waiver. And whether "substantial construction" as defined by the Illinois local authorities has taken place is a matter to be determined in accordance with local Illinois law. Accordingly, we will condition the effectiveness of our certification herein on a demonstration by Paxton of compliance with Order No. 71–2983 of the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois. *Illinois Commerce Commission*, FCC 72–949, — FCC 2d —.

In view of the foregoing, we find that a grant of Paxton Community Antenna System, Inc.'s "Application for Certification" (CAC–216) would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certification" filed April 20, 1972, and amended July 27, 1972, by Paxton Community Antenna System, Inc., IS GRANTED and that an appropriate Certificate of Compliance will be issued.

IT IS FURTHER ORDERED, That the "Objections of Plains Television Corporation" filed June 2, 1972, by Plains Television Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection Pursuant to Section 76.17" filed June 2, 1972, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance and Contingent Petition for Special Relief" filed June 2, 1972, by WFIL, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1175

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST ON BEHALF OF STATION KCPX-TV, SALT LAKE CITY, UTAH, FOR DECLARATORY RULING OR WAIVER IN CONNECTION WITH USE OF MOTION PICTURES IN "CLEARED" PRIME TIME

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released December 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN RESULT; COMMISSIONER H. REX LEE CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission here considers a "Motion for Declaratory Ruling and Request for Waiver" filed on September 29, 1972, by Screen Gems Stations, Inc. (Screen Gems), on behalf of its Station KCPX-TV, Salt Lake City, Utah (ABC-affiliated). The request concerns the "off-network" and "feature film" provisions of the prime time access rule, Section 73.658(k)(3), to permit the showing of certain movies which the station bought from ABC Films in 1971. The request was served on the other two Salt Lake City stations; no response was filed.

2. Section 73.658(k)(3), as amended in the August 1970 decision on reconsideration of the prime time access rule (25 FCC 2d 318, 334-335, 337), reads as follows:

> (3) The portion of time from which network programming is excluded by subparagraph (1) hereof may not after October 1, 1972, be filled with off-network programs; or feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market.

Screen Gems' request is basically in two alternative parts: (a) interpretation of this language in two respects, which would give it the relief sought if both points are decided in its favor; or (b) waiver of the rule as to KCPX-TV. The two points involved are:

> (1) whether movies previously shown in the market on a network program are "off-network programs", permanently barred from further use in "cleared" prime time; or are "feature films", so barred only for two years from their previous showing.
>
> (2) whether (assuming such material is "feature film") the two year restriction on re-use in "cleared" prime time runs against the station which previously showed the program.

3. Screen Gems states that it bought two small packages of ABC-produced movies in 1971, one in January and one in September, total-

ling 25 titles and all of them made for and previously shown once or more on the ABC network, including Salt Lake City. It points out that the first date was before the Commission's public notice of April 1971, setting forth the "top 50 markets" which would be covered by the prime-time access rule during the 1971–72 year (Salt Lake City had not been in the top for the two previous years, was included among them in 1971–72 and 1972–73, and will again be outside in 1973–74). The films were bought on the basis of 5 runs over a 5-year period.

Arguments for Liberal Construction

4. We point out initially that, for the present, the first point mentioned above has been resolved in favor of the Screen Gems Position, in an action since its request was filed. In a Public Notice adopted November 15, 1972, FCC 72–1032, the Commission noted the ambiguity in the rule as to whether network-shown movies are "off-network programs" or "feature films" for the purpose of the rule, and also the fact that this matter is under consideration in the over-all prime time access rule-making proceeding (Docket 19622), in which decision is expected by fairly early next spring. (See Notice of Inquiry and Notice of Proposed Rule Making, FCC 72–957, pars. 41–44.) Therefore the Public Notice stated that, in view of the short time involved, there is no need for a formal interpretation of the rule, but that enforcement action would not be taken against any licensees who rely on the more liberal construction and present, in "cleared" prime time, movies previously shown on a network, more than two years after their previous showing. Thus, there is no need to consider further this aspect of the matter.

5. As to the second interpretation point mentioned above, this too has been passed upon by the Commission in an earlier Public Notice issued April 6, 1972 (FCC 72–305, 34 FCC 2d 1099). In Question and Answer No. 2 in that document, it was stated that the two-year limitation does run against the station which previously showed the program. Screen Gems notes this, but asserts that probably all considerations were not weighed in reaching that ruling, and reconsideration is appropriate. It is claimed that at best, the two-year limitation seriously impinges on the public's ability to see feature films in prime time, and this is compounded if the "rest" period applies to the station which previously carried the movie, and even more so in markets (such as Salt Lake City and 15 other "top 50" markets) where there is no independent station. It means that a movie can be shown in the market in prime time only once every two years (without impinging on network programming); this is said to be contrary both to the interest of the public and that of the independent producers whom the rule was designed to benefit (the latter is said to be true because the producer's potential revenue is hurt by any restriction on use of his product during prime time). It is claimed that the result is akin to the evils of "warehousing" of non-network programs, under unduly long exclusively provisions, which the Commission has claimed to exist. In sum, it is said, this artificial restriction will deprive the public of the best possible program schedule the licensee could muster

in the absence of restraints, and thus the best interests of the public suffer.[1]

6. In support of its waiver request, assuming one or both of the interpretation points go against it, Screen Gems urges the point mentioned above, that it bought one of its packages before Salt Lake City was known to be included in the markets covered by the rule, anticipating five runs in five years, and it will suffer substantial economic loss if it cannot run them in prime time more than once every two years. It is also said that since there is no independent station in the market, the public is deprived of a chance to view the films except on a very limited basis.

Discussion and Conclusions

7. As indicated above, one part of the Screen Gems request has already been granted by our November 15 Public Notice permitting network-shown movies to be shown again in "cleared" prime time by stations two years after their network showing (or after any other later showing they may have had in the market). This should be of some benefit to Screen Gems with respect to the two packages mentioned (unless it has already used the films on the station at some other hour), since one of them has been owned by Screen Gems for nearly two years and the other for over a year. Thus, much of the restriction based on any earlier *network* showing has by now been eliminated, or will be in the near future.

8. We do not believe it appropriate to go further than this at this point, either by way of reconsidering our interpretation on the second question raised, or by way of waiver. As to the general question—holding that the two-year restriction does not apply to further showings on the station which previously ran the film—this would obviously be inconsistent with the purpose of the prime time access rule, as well as having no warrant in its language and amounting to reconsideration (on the basis of a non-timely request) of a general ruling previously given. While the rules were expressly not designed to "promote the production of any particular type of program" (Report and Order in Docket 12782, par. 26, 23 FCC 2d 397), it was certainly designed to open valuable prime time in major markets to *sources of new non-network material*, and not movies which, by definition, have been shown in the market before. The original rule, adopted in May 1970, barred entirely from "cleared" prime time feature films previously shown in the market at any time in the past; it was only as a matter of convenience that the two-year provision was substituted. Unlike the "off-network"-"feature film" point, there was no ambiguity in the rule in this respect. The present Screen Gems request for ruling would be clearly inconsistent with this over-all purpose. In fact, relaxing this provision in the manner urged would

[1] Screen Gems asserts that a licensee, if inhibited in use of his films during "cleared" prime time, may be inclined to take the "easy road" and use his film material in other prime time, showing it instead of network movie programs. It is said that while this "may best serve bureaucratic fiat", it will be contrary to the best interests of the viewing public. The best scheduling, it is urged, demands *ad hoc* decisions to meet the needs of each market.

largely serve to nullify it entirely, since, under present exclusivity practices in the film-selling industry, normally the only station in a market which would have a right to present the movie a second time in less than two years would be the same station which presented it the first time.[2]

9. Another reason for this view, of course, is that the matter is under consideration in the general prime-time rule proceeding, Docket 19622. This makes a sharp departure from the present provisions inappropriate at this time, since any needed changes may be urged and, if appropriate, adopted, in that proceeding. The time before decision is reached in that proceeding is expected to be short, and it does not appear that Screen Gems and its station will suffer serious hardship in the interim. Moreover, with Salt Lake City being outside the "top 50" markets for the 1973–74 year, any restriction will not apply after October 1, 1973.

10. As far as the waiver request is concerned, there appears no reason to consider this at all with respect to the film package which Screen Gems bought after it was aware that the rule would cover Salt Lake City. As to the other package—that bought in January 1971—perhaps a better case could be made, since in the previous two years Salt Lake City was not in the top 50 markets. However, we do not have any specific information before us as to how many pictures are involved, how many times they may have been shown, or other pertinent matters bearing on the question of whether waiver is appropriate or, indeed, even necessary. Therefore, and also in view of the short time involved before decision is expected in the over-all proceeding, waiver (which might have to be extended to a number of other situations if granted here) does not appear warranted.

11. In view of the foregoing, IT IS ORDERED, That except as to "Question A" in the pleading (in which respect the motion is dismissed as moot) the "Motion for Declaratory Ruling and Request for Waiver" filed by Screen Gems Stations, Inc. on September 29, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER H. REX LEE CONCURRING IN PART AND DISSENTING IN PART

I concur in the majority's decision insofar as it denies the request of Screen Gems Stations, Inc. (on behalf of its Station KCPX–TV, Salt Lake City, Utah) for a "liberal" interpretation or waiver of the provisions of Section 73.658(k)(3) of the "Prime Time Access Rule." Screen Gems would have us hold that the two-year restriction on the

[2] This would not necessarily be true with respect to a first "non-network" showing less than two years after a network presentation, since the station buying the film for "non-network" use might be a different one from the network affiliate station which presented it on a network basis. However, Screen Gems does not make any distinction of this sort in its request, and it does not appear to apply to its situation anyhow, since, as far as appears, the movies were shown on the ABC network over KCPX–TV, and then later were acquired by KCPX–TV. As noted, the two-year restriction on use of these films arising from the *network* showing has largely or entirely been removed by the passage of time as to the first package, and will soon pass as to the second.

reuse of a feature film in the cleared portion of prime time does not apply to the station which previously broadcast the film. However, such an interpretation is clearly inconsistent with the announced purpose of the rule, *i.e.*, to clear a portion of prime time for local and non-network programming. As the majority points out, any relaxation in this regard would effectively nullify the provision since, in most cases, the only station in a market which would have the right to broadcast a feature film a second time in less than two years would be the same station that had presented the film the first time. Moreover, the Commission has already held that the two-year restriction does run against a station which had previously broadcast a feature film. See Public Notice of April 6, 1972, 34 FCC 2d 1099, 24 RR 2d 1711. For all practical purposes, the Screen Gems motion amounts to a very untimely request for reconsideration of the Commission's earlier interpretation and should be denied.[1]

On the other hand, I must dissent to that portion of the majority's decision, which is based on a Public Notice of November 17, 1972, FCC 72–1032, and which effectively permits Screen Gems to broadcast feature films previously shown on a network in the cleared portion of prime time. The Public Notice was issued in response to inquiries concerning the impact of the "Prime Time Access Rule" on feature films initially presented in a market as network programs. Rather than clarify whether such films are to be considered "off-network programs," which are barred permanently from the cleared portion of prime time, or "feature films," which are barred only for two years after their previous broadcast in a market, the majority indicated that it will take no enforcement action against any licensee who has construed the rule liberally in regard to the broadcast of feature films previously shown by a network. I have already had occasion to comment on the majority's position in this regard in my dissenting statement issued with the November 17, 1972, Public Notice. At that time, I indicated that Section 73.658(k)(3) should be interpreted so that feature films initially carried by a network—whether intended for theatre or television exhibition—will be treated as "off-network programs" and will be barred from the cleared portion of prime time. I adhere to my prior position since it serves the basic objectives of the "Prime Time Access Rule," and, as a result, I dissent to the majority's affirmance of the November Public Notice in the present consideration of the Screen Gems request.

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[1] I also concur in the majority's denial of the alternative waiver request by Screen Gems.

F.C.C. 73R-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GARY ACKER, BILLY WOLFE, DON BURRELL, CHARLES BURTON AND PAUL L. BRADSHAW, D.B.A. QUEEN CITY BROADCASTING CO., SPRINGFIELD, MO. For Construction Permit	Docket No. 19480 File No. BP-18321

MEMORANDUM OPINION AND ORDER

(Adopted January 11, 1973; Released January 16, 1973)

BY THE REVIEW BOARD:

1. Following a merger of A–W Broadcasting Company and Queen City Broadcasting Company [1] and the severance of the application of William B. Neal,[2] one applicant remains in this proceeding. That applicant consists of the two principals of A–W and Messrs. Burrell, Burton and Bradshaw, three of the five principals of Queen City. Prior to consummation of the merger, petitions to enlarge issues had been filed which must be disposed of.[3]

2. A–W's petition to add a Section 1.65 issue against Queen City will be denied. It is certainly highly questionable whether it was necessary for Queen City to report the election of one of its principals, Mr. Bradshaw, to the Missouri Senate, and Mr. Burton's employment at a Springfield television station was reported in the application, albeit not in one of the places where it should have been. The Board can find no merit in A–W's attempt to justify the 1.65 issue in part on the fact that in their financial support of the Queen City proposal the partners have agreed to provide greater sums than were committed by them in the partnership agreement. Clearly, A–W's allegations, when considered in light of the responses thereto, are insufficient to raise a character qualifications question, and it is only this possibility that must be decided at this stage of the proceeding.

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[1] FCC 72M–1289, released October 17, 1972.
[2] FCC 72M–1303, released October 18, 1972.
[3] The following pleadings are before the Board: motion to enlarge issues, filed April 19, 1972, by Queen City; Broadcast Bureau's comment to Queen City's petition, filed May 3, 1972; opposition to Queen City's motion, filed May 15, 1972, by A–W; supplemental opposition, filed June 7, 1972, by A–W; reply to opposition, filed June 9, 1972, by Queen City; statement of Queen City Broadcasting concerning its petition to enlarge issues, filed July 12, 1972. Petition to enlarge issues, filed April 19, 1972, by A–W; Broadcast Bureau's opposition to A–W's petition, filed May 3, 1972; Queen City's opposition to petition, filed May 15, 1972; reply, filed June 9, 1972, by A–W; and statement of A–W concerning its petition to enlarge, filed July 12, 1972. Further petition to enlarge issues, filed May 9, 1972, by A–W; opposition to further petition, filed May 19, 1972, by Queen City; reply of A–W, filed June 9, 1972; and statement of A–W concerning its further petition to enlarge issues. Broadcast Bureau's motion to strike, filed July 17, 1972; reply of A–W and Queen City to motion to strike, filed August 2, 1972.

3. A–W's request for a site availability issue has been rendered moot by the merger which proposes use of A–W's site.

4. The misrepresentation issue sought by Queen City against A–W will also be denied. A commitment to spend full time in the operation of a station is reasonably satisfied if forty hours a week are devoted to this activity, and the pleadings before us do not raise any substantial doubt that Mr. Acker is doing this for Station KGOY. The time he also spends on the affairs of another station in which he is interested is not sufficient to cast doubt upon his representations concerning KGOY. The Board is offered no grounds for doubting A–W's assertion that if a grant were made to it, Acker would shift the emphasis of his efforts from KGOY to the new station and make new arrangements for the operation of the former.

5. A–W has also sought an issue against Queen City relating to an investigation which was conducted at Queen City's behest to ascertain how much time Mr. Acker spent in Springfield. While the Board would agree that the investigation was conducted in a rather inept and clumsy way, the affidavits in support of the request fail to indicate the type of conduct which the Board found unacceptable in *Chronicle Broadcasting Co.*, 19 FCC 2d 240 (1969). Therefore, this request for issues will also be denied.

6. The Broadcast Bureau's motion to strike the two "Statements", filed on July 12, 1972, by A–W relative to its two petitions to enlarge issues and a similar "Statement" concerning its petition filed by Queen City on the same date will be granted since they are unauthorized pleadings, and they have not been considered in evaluation of the petitions to enlarge. However, the Board feels called upon to express its displeasure with the tactics reflected by these pleadings. Such easy changes in attitude as are reflected in the "Statements" could suggest that the motives for filing the petitions to enlarge were primarily to gain competitive advantages.

7. IT IS ORDERED, That the petitions to enlarge issues discussed above ARE DENIED and that the Broadcast Bureau's motion to strike IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-396

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIO DINUBA CO., DINUBA, CALIF.	Docket No. 19566 File No. BPH-7567
KORUS CORP., DINUBA, CALIF. For Construction Permits	Docket No. 19567 File No. BPH-7657

MEMORANDUM OPINION AND ORDER

(Adopted December 22, 1972; Released December 26, 1972)

BY THE REVIEW BOARD:

1. This proceeding, involving the above-captioned applications for a new FM broadcast station, was designated for hearing by Order, 37 FR 16993, published August 23, 1972. Now before the Review Board is a motion to enlarge issues, filed on October 17, 1972, by Radio Dinuba Company (Dinuba), seeking the addition of candor and ineptness issues against Korus Corp. (Korus).[1]

2. Dinuba's petition will be denied. As pointed out by Korus in its opposition, the petition is untimely and no good cause for the late filing has been shown. Petitioner relies on information which has been a matter of public record since 1968, and the allegation that this information "just recently came to the attention" of Dinuba is clearly an insufficient reason for the delay in filing. Moreover, the Board does not share petitioner's view that the addition of the requested issues is warranted despite the untimeliness. Both of the requested issues are predicated on the fact that, Harold O. Torosian, Korus' proposed general manager, was accused in 1968, of making false log entries, and with first denying and subsequently admitting having made such entries.[2] However, we agree with the contentions of Korus and the Broadcast Bureau that there is no requirement to report the fact that a prospective employee, who is not a stockholder, officer, or director of an applicant,[3] was once charged with misconduct. Therefore, the failure to report this information does not reflect on the applicant's candor. Nor do we perceive

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's opposition, filed October 25, 1972; (b) opposition, filed November 1, 1972, by Korus; and (c) reply, filed November 20, 1972, by Dinuba.

[2] These charges were contained in an Order to Show Cause (FCC 68-700, released July 9, 1968) and Bill of Particulars directed against the licensee of FM Station KDFR, Tulare, California; Torosian was an employee of that station. However, since the licensee did not file a renewal application, the hearing was mooted and never held.

[3] The fact that Torosian is being held out as a prospective management level employee in connection with its efforts to ascertain community needs does not elevate him to the status of a principal. Moreover, as pointed out by the Bureau, the Commission has consistently held that a licensee is responsible for the operation of a broadcast facility and the delegation of authority to employees does not relieve the licensee of responsibility for infractions of Commission rules.

any basis for questioning the applicant's responsibility, motivations or capabilities because of this matter.

3. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed on October 17, 1972, by Radio Dinuba Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

109-023—73——5

F.C.C. 73-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE RULES INSOFAR AS THEY PERTAIN TO THE RADIO CONTROL OF REMOTE MODEL CRAFT AND VEHICLES	Docket 19572, RM-1951

REPORT AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION:

1. The Commission adopted a Notice of Proposed Rule Making in the above entitled matter on August 16, 1972, which was published in the Federal Register on August 29, 1972 (37 F.R. 17497). Interested persons were invited to file comments on or before September 29, 1972, and reply comments on or before October 10, 1972. The Notice was in response to a petition, RM-1951, filed by the Academy of Model Aeronautics and proposed the incorporation of special provisions into the Rules to exempt certain low power amateur radio stations used only for transmitting signals for the control of model vehicles of all types.

2. Formal comments were filed by C. T. Williams; Dr. Walter A. Good; Robert F. Aberle; Kraft Systems, Inc.; Michael L. Gilbertson; Dick Jansson Radio Control Corp.; American Radio Relay League (ARRL); and Academy of Model Aeronautics (AMA). All respondents supported the proposal. No comments were received expressing opposition.

3. As claimed by the petitioner, respondents also state the present rules governing the Amateur Radio Service are overly restrictive when applied to radio remote control of model aircraft. Petitioner requested comparability between the rules governing like-type operation in the Amateur Radio Service and the Citizens Radio Service, where radio remote control is also permitted. In support of this request, respondent Williams states:

> "As a long-time user of six meters for model control purposes, I have felt strongly that the rules of Part 97, as written, were clearly designed for two-way communications between licensed amateurs, and were more restrictive than necessary for the low-power, short-range, essentially one-way type of transmissions used in model control activities."

A similar opinion was stated by respondent Aberle:

> "It is my opinion the R/C flyers have, in fact, avoided six meters because of the additional record keeping and expense associated with its use. Adoption of this proposal would, in my estimation, act as an incentive for increased six meter R/C flying activities. This is a very important consideration since our "R/C" citizens bands are presently very congested."

4. The AMA petition also requested the special provisions for radio control equally apply to transmissions used for telemetering purposes. Our Notice stated that the petitioner did not furnish details and rationale for this request, and we requested interested parties having information and suggestions in this area to submit same for consideration. One formal comment received in this regard was from respondent Gilbertson, who stated:

> ". . . there are several small manufacturers producing telemetering devices specifically designed for remote controlled model aircraft. Perhaps the greatest usage at this time is a device used by glider/sailplane modelers to transmit changes in altitude and/or barometric pressure in order to maximize use of the thermal and wind currents necessary to fly this type of aircraft. Other telemetering devices currently available or contemplated include airborne air-speed indicators, tachometers, engine temperatures, etc. which are useful in experimentation and design of various model craft."

5. Representatives of the AMA visited the Commission and demonstrated an application of telemetering technology to model aircraft flying. The transmitter was installed in a flyable model, and operated in the 144 MHz amateur frequency band with F3 emission at a power level of less than 200 milliwatts. The only parameter telemetered was an indication of change in the aircraft rate-of-climb. The AMA representatives reported that some model aircraft can attain altitudes approaching those reached by full size aircraft. Additionally, the AMA formal comments state:

> "Other functions such as speed and altitude have been telemetered for experimental purposes and these are also in need of the same provisions as proposed for the radio control transmission since they are used only when the model is airborne and under control. It is, therefore, proposed that the same provisions apply to telemetry transmissions related to the model aircraft where the telemetry units would be operated on amateur frequencies above 144 MHz and employing power inputs of less than 200 milliwatts."

6. The Dick Jansson Radio Control Corp. comments state they have low power telemetry devices for model sailplanes in production. Furthermore, respondent states:

> "With the sensitive receivers available today, this telemetry unit can be heard for a range of 200 foot on the ground, and I have personally experienced a 4000-foot line-of-sight in air range. . . . . ."

7. Currently, the only authorized use of telemetry in the Amateur Radio Service is in the OSCAR 6 satellite station WA3NDS. In this instance, certain rules applicable to all amateur radio stations were temporarily waived pending the adoption of rules for space radio stations. This satellite uses two telemetry transmitters. Several parameters are sequentially transmitted using A1 emission, and the transmitters can be commanded on and off by radio remote control. Identification is accomplished by transmitting the letters "HI" in Morse Code.

8. The ARRL comments support the adoption of Section 97.99 as proposed in the Notice of Proposed Rulemaking. The filing states:

> "The potential benefits to the Amateur Radio Service far outweigh any possible adverse impact. It is respectfully suggested, however, that the Commission's Report and Order clearly state that such operations will not be entitled to protection from interference from other amateur radio stations operating in compliance with the various rules."

109-023—73——6

9. Inasmuch as no objections were filed in response to our Notice of Proposed Rulemaking, and since no additional information has been brought to our attention, we believe the special provisions for amateur radio stations used only for radio control of remote model crafts and vehicles should be adopted as proposed in the Notice.

10. While we are sympathetic with the request of the AMA for additional special provisions for telemetering, we find the request is not adequately supported. Even a 200 milliwatt transmitter operating at high altitudes can be heard over areas of hundreds of miles, and would not compare to the very limited coverage of a control transmitter located at ground level. Therefore, exceptions to the identification and control requirements cannot be made for telemetry stations operating in the Amateur Radio Service.

11. The ARRL in its comments expresses concern about interference which may occur from amateur radio stations operating normally on frequencies used for remote-control purposes. Operation in any amateur band, for any purpose, is always subject to interference from other stations. The Amateur Radio Service per-se is one involving a high degree of frequency sharing. It would be naive, to say the least, to attempt to write a rule which would purport to give a measure of protection to any emissions permitted within the amateur bands. Section 97.125 prohibits willful or malicious interference to any radiocommunication. Amateurs are expected to abide by the provisions of that rule. Nevertheless, the nature of the remote control function for model aircraft may make it impossible for amateurs to realize that interference is being caused. Users of amateur frequencies in accordance with the new Section 97.99 should be aware of the possibilities of such interference and take whatever measures are practicable in the way of advance coordination and planning to ensure the greatest degree of satisfactory operation.

12. We find the attached amendments to the rules are necessary and desirable, and in the public interest. Authority for adoption of these amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

13. Because the rules adopted herein relieve restrictions pertaining to the use of amateur radio stations used only for radio control of remote model craft and vehicles, the effective date provision of the Administrative Procedure Act (5 U.S.C. 553) does not apply. Accordingly, IT IS ORDERED, That effective January 15, 1973, Part 97 of the Commission's Rules is AMENDED as set forth in the attached Appendix.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 97 of the Commission's Rules is amended as follows:

1. Section 97.99 and undesignated headnote "SPECIAL PROVISIONS" are added to read as follows:

SPECIAL PROVISIONS

§ 97.99 *Stations used only for radio control of remote model crafts and vehicles.*

An amateur transmitter when used for the purpose of transmitting radio signals intended only for the control of a remote model craft or vehicle and having mean output power not exceeding one watt may be operated under the special provisions of this section provided an executed Transmitter Identification Card (FCC Form 452–C) or a plate made of a durable substance indicating the station call sign and licensee's name and address is affixed to the transmitter.

(a) Station identification is not required for transmissions directed only to a remote model craft or vehicle.

(b) Transmissions containing only control signals directed only to a remote model craft or vehicle are not considered to be codes or ciphers in the context of the meaning of § 97.117.

(c) Notice of operation away from authorized location is not required where the portable or mobile operation consists entirely of transmissions directed only to a remote model craft or vehicle.

(d) Station logs need not indicate the times of commencing and terminating each transmission or series of transmissions.

2. In § 97.101, the headnote is amended to read as follows:

§ 97.101 *Mobile stations aboard ships or aircraft.*

* * * * * * *

F.C.C. 72-1184

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE COMMISSION'S RULES CONCERNING THE LICENSING AND OPERATION OF REPEATER STATIONS IN THE AMATEUR RADIO SERVICE	Docket No. 18803, RM-388, RM-1087, RM-1209, RM-1542, RM-1725

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 2, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration its Report and Order (FCC 72-757) released September 8, 1972, in the above-entitled proceeding, the petitions for reconsideration, and/or stay, and other petitions requesting changes to the rules adopted in the Report and Order, filed by The Northern Berkshire Amateur Radio Club, Inc.; Wayne Green (2 petitions)[1]; 73 Magazine for Radio Amateurs (4 petitions)[1]; The Texas VHF-FM Society; The Fort Worth Chapter of the Texas VHF-FM Society; Fort Worth-Tarrant County Office of Civil Defense; Fort Worth-Tarrant County RACES; North Central Texas Six-Meter Repeater Association; Repeater Committee of the Arlington (Texas) Radio Club; VHF Advisory Committee of Montana; The Engineers Repeater Group; American Radio Relay League (ARRL); Naval Communications Command; Ben F. Meyers, Jr.; Michael F. Troy, et al.; James L. Hudson; Roy L. Albright; Robert S. Levy; P. Mieir; H. L. Watkins; and the Northeast Repeater Association. In addition to these petitions, which were timely filed, there were a number of informal letters and petitions received by the Commission after the time for filing petitions for reconsideration had expired,[2] both in support and in opposition to the amendments to Part 97 as adopted in the Report and Order.

2. Briefly summarized, the petitioners request reconsideration of the Report and Order, and seek either additions, deletions, modifications or a combination of these to the amendments adopted therein, or a stay in the date the amendments become effective. The petition of the North-

[1] One of the Wayne Green petitions, and the four 73 Magazine petitions were not petitions for reconsideration and/or stay. Since they do request amendments to the rules adopted in the Report and Order, they are included in this proceeding.

[2] Section 405 of the Communications Act of 1934, as amended, requires petitions for reconsideration to be filed within 30 days from the date which public notice is given of the order, decision, report, or action complained of. Among the late filed petitions were those filed on behalf of the Interstate Repeater Society, the Amateur Radio Caravan Club of New Mexico, and the Trenton Radio Club. The Commission has no authority to extend the time during which petitions for reconsideration may be filed.

east Repeater Association, requests neither a petition for reconsideration nor a petition for review, but merely requests an extension of 30 days in which to file a petition for reconsideration.[2]

3. The majority of the petitions address the matter of supervisory control of a repeater station, and the nature of the responsibility of a repeater station control operator. Indeed, from the remarks of the petitioners, it appears some misunderstanding existed about the need for a control operator under the rules in force prior to the adoption of Report and Order 18803. Then, as now, when in operation every amateur radio station must have a control operator at an authorized control point. Unattended operation of an amateur radio station is not provided for in the rules. The petition of the Fort Worth-Tarrant County Office of Civil Defense, requests amended rules to permit repeater stations to operate without a control operator on duty. Petitioner Albright requests additional rules for special unattended repeater stations equipped for tone-coded access on the input frequency. Petitioner Hudson requests another class of repeater station be established in order to accomplish the same purpose. The Engineers Repeater Group petition requests tone-coded access be a requirement for all repeater stations, and the user-operator transmitting the access signal be made responsible for the proper use of the repeater station. The Texas VHF–FM Society petition requests tone-coded access be permitted as an alternative to continuous monitoring.

4. Seven petitioners request that the rules place the burden for proper use of repeater station only upon the user station operator transmitting on the input frequency of the repeater station. They further request that the rules limit the responsibility of a repeater station control operator to properly maintaining the technical operation of the station. Of these petitions, several would require the control operator to have the means to remove the repeater station from service upon notification that the station was being used improperly. Although not specified, the notification would presumably come from user operators. Petitioners would allow 15 minutes or more after the notification for the control operator to terminate the repeater station transmissions.

5. Seven petitioners request rules for repeater stations having wide regional coverage. The petitions request deletions of the provisions of § 97.89(c) and § 97.69(c) which effectively limit the service area of repeater stations to intra-community coverage. Some of these also request an increase in the maximum authorized power limits for repeater stations, in one or more amateur frequency bands.

6. The Fort Worth-Tarrant County Office of Civil Defense petition requests, in effect, that repeater stations in RACES be permitted to operate in the entire 220–225 MHz frequency band. Petitioner Harris requests the same provisions and would also allow RACES repeater stations operating on frequency bands 50.35–50.75 MHz and 145.17–145.71 MHz to also be used for non-RACES purposes. A 73 Magazine for Radio Amateurs petition requests the entire frequency band 220–225 MHz, and an additional 2 MHz from 440 to 442 MHz, also be made available for repeater station operation. Additionally, petitioner 73 Magazine, requests rules permitting crossbanding of repeater stations.

7. The Northern Berkshire Amateur Radio Club petition requests the deletion of the requirement for certain of the showings specified in § 97.41 for repeater stations. The Repeater Committee of the Arlington Radio Club petition requests additional rules providing for temporary, experimental repeater stations.

8. The information submitted in the petitions adds nothing new to that available and considered by the Commission in adopting the Report and Order. While the Texas VHF–FM Society petition puts forth the argument that amateurs have demonstrated the means to generate stable, distortion-free, audio tones required for accurately coding and decoding control signals, through the use of a recently available, inexpensive, hybrid integrated circuit, tone stability alone was not a major consideration in the decision to confine the use of such signals on a repeater station input frequency to secondary control purposes only.

9. Operation of a repeater station in the Amateur Radio Service can present unique problems not comparable to other radio services such as Land Mobile or Citizens Class A, where control operators are not required at repeater stations. For instance, specific frequencies are not assigned to amateur radio stations, as they are in other radio services. An amateur radio station operating frequency must be selected by the control operator. Good amateur practice requires that he monitor his selected frequency prior to transmitting, in order to insure that the transmission will not interfere with radiocommunication already in progress on that frequency. Repeater stations are no more exempt from this requirement than are any other type of amateur radio station. Indeed, with over 90% of the licensed amateurs in the Country alone having access to all of the frequencies where repeater stations are permitted to operate, supervisory control is very necessary. Moreover, these frequencies are not limited to voice operation. All of the types of emissions authorized for amateurs may be used on most of the frequencies where repeater stations are also permitted to operate.

10. Good amateur practice also requires the control operator of a repeater station to monitor the input receiving frequency prior to activating the repeater transmitter. A repeater station, as with any amateur station, may not retransmit signals not intended for retransmission. Again supervisory control is necessary since there could be radiocommunication already in progress on the input frequency not intended for retransmission. Also, if a repeater station retransmitted a simplex radiocommunication between stations on the input frequency, it would be violating the rules prohibiting one-way transmissions.

11. Several petitioners recognize these problems and propose to overcome them through a tone-access system. Users would activate the repeater station by transmitting a certain combination of tones on the repeater station input communication frequency channel. Such a technique is inadequate to provide supervisory control over a remote station. It will not prevent the activation of the station by unauthorized persons, nor will it assure that the control operator can de-activate the station when there are interfering stations on the same input frequency channel. Controlling an amateur radio station by radio re-

mote control with a control link that uses a widely-known frequency, such as the input communication channel of a repeater station, is not good amateur practice. The use of widely-known audio tones, such as those used in public telephone dialing systems, for remotely controlling an amateur radio station, is also not good amateur practice. A basic principle of radio control is that there be a reasonable probability the remote station will not be activated by unauthorized persons, and the control operator can indeed effect supervisory control of the station from the remote control point just as well as if the control point was located at the station.

12. We believe the ingenuity of amateurs can eventually develop the techniques, technical and operational, that will permit the adoption of rules for automatically controlled repeater stations. It is conceivable that automatic and reliable means can be developed that will perform all of the supervisory functions of a repeater station control operator under certain specific conditions. The Commission urged knowledgable persons to submit information on this approach. Several amateurs have already responded and although their ideas show promise, it is clear that provisions for automatic control are not warranted at this time.

13. The ARRL petition requests the effective date of the new and amended rules relating primarily to repeater stations be stayed until February 19, 1973. The Levy petition requests the rules be implemented after a minimum of ninety days. One of the Green petitions requests a delay of one year in the effective date of the amendments. The Troy petition would stay and put aside selected portions of the new rules. Inasmuch as the policy established for transition to the new rules announced in a Public Notice (90785) dated October 6, 1972, does provide a reasonable time for existing stations affected by the new rules to make the appropriate modification necessary for compliance, for the most part the objectives of the petitioners are already achieved. For instance, a station operating as a repeater station, and/or one authorized for remote control, whose license was granted as a result of an application filed prior to October 17, 1972, the effective date of the new rules, should comply with the new rules to the extent possible after that date, but must fully comply by no later than June 30, 1973. In view of the time and effort already expended in studies, evaluations and discussions in this matter, there should not be any further delay, with consequent postponement of the substantial public benefits the new rules promise.

14. The petition by the Naval Communications Command would delete military recreation stations from the types of amateur radio stations prohibited from portable or mobile operation by § 97.95(a)(1). Petitioner cites three examples of portable operation by military recreation stations: K4NAA at the Armed Forces Communications and Electronics Association Annual Convention; Navy or Marine Corps sponsored military recreation/MARS station exhibit at the Southern Nevada Amateur Radio Club, Inc. Annual Convention; and the field day and emergency communications provided by K3USN. Since non-amateurs may be the license trustee of a military recreation station, they are not required to be familiar with our rules. These

stations are principally intended for the recreational use of amateur radio operators serving in the Armed Forces, and the few instances where portable or mobile operation of a military recreation station is warranted can be best handled on a case-by-case basis.

15. After reconsideration of all factors raised in the several petitions, we conclude that the amendments to the Amateur Radio Service Rules as adopted by the Report and Order, FCC 72–757, on August 29, 1972, in Docket 18803 are reasonable and in the public interest. Therefore, in view of the foregoing, IT IS ORDERED, that the petitions for reconsideration and/or stay listed in paragraph 1 ARE DENIED and that the amendments to the Amateur Radio Service Rules, Part 97 adopted on August 29, 1972, ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.621 AND 73.682 OF THE COMMISSION'S RULES TO PROVIDE FOR A LIMITED AMOUNT OF ENCODED ("SCRAMBLED") TRANSMISSIONS BY NONCOMMERCIAL EDUCATIONAL TELEVISION STATIONS	Docket No. 18535, RM-1365

REPORT AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND WILEY CONCURRING IN THE RESULT.

1. In response to a petition of Community Television of Southern California (licensee of noncommercial educational television Station KCET, Channel 28, Los Angeles, California (KCET)), RM-1365, filed on November 1, 1968, the Commission adopted, on April 23, 1969, a Notice of Proposed Rule Making, released April 25, 1969 (FCC 69-440, 34 F.R. 7086) in the above-entitled matter which invited comments on petitioner's proposal to amend our rules so as to provide, on a nationwide basis, for "scrambled" instructional broadcasts to the medical and law enforcement professions.

2. In this proceeding interested parties were afforded an opportunity to comment on or before June 2, 1969, and to reply to such comments on or before June 12, 1969. Comments and/or reply comments were timely filed expressing the views of: Twin City Area Educational Television Corporation; Midwestern Educational Television, Inc.; County of Los Angeles, Office of the District Attorney; Commonwealth of Virginia-Governor's Office, Advisory Council on Educational Television; Medical Television Network; Community Television of Southern California; Wilfred Snodgrass, M.D.; Community Medical Television System of Emory University School of Medicine; Veterans Administration Hospital, Los Angeles, California; National Association of Educational Broadcasters and National Cable Television Association, Inc. Each of the comments and reply comments except that of National Cable Television Association, Inc. are similar and support petitioner's proposal.[1]

[1] The National Cable Television Association, Inc. requested that our action in this proceeding be delayed until the Commission resolved Docket No. 18397 which deals with a basic revision of the regulatory system for Cable Television. Docket No. 18397 and its related dockets were resolved by the Commission in its recent issuance of our new cable television rules. See our Report and Order in Docket Nos. 18397 *et al.* adopted February 2, 1972 (FCC 72-108, 37 F.R. 3252).

3. The Commission's Notice proposed the consideration of the use of noncommercial educational television broadcast facilities for transmission of "scrambled" video and multiplexed FM subcarrier aural signals at times, it is alleged, they would not interfere with normal broadcast schedules. The nature of the "scrambled" instructional program material proposed to be broadcast would consist of new information and developments for doctors and nurses and law enforcement officers.

4. The pleadings indicate that under authority granted by the Commission, KCET conducted, from 1965 to 1968, experimental "scrambled" broadcasts intended only for confidential reception by doctors, nurses, and law enforcement officers. The normal audio channel of the station was used to continuously apprise the public that the station was broadcasting a "scrambled" video signal, and that their receiving sets were in order. Parties connected with this experiment do not indicate problems with the engineering aspect of the broadcast procedures.

5. The pleadings in this proceeding each made the same points except for that of National Cable Television Association, Inc. (see footnote 1 *supra*). Each of the proponents indicates its belief in the benefit the subject telecasts would bring to society by developing an additional means for keeping doctors, nurses and law enforcement officers apprised of current developments. Further, it is contended that the use of existing educational television stations for the "scrambled" broadcasts is the most economic way of broadcasting the subject instructional material. We have carefully examined the pleadings submitted in support of KCET's "scrambled television" proposal and have reached the conclusion that our initial reasoning and concern regarding the use of conventional noncommercial educational broadcast stations for the transmission of instructional programming to an intentionally restricted audience to the exclusion of the general public still stands. We view such point-to-point transmission as a poor use of valuable spectrum space, especially in highly urbanized areas like Los Angeles, where petitioner would wish to operate. Even though relatively little interest has been shown in the proposed service, we are convinced that to authorize it would "be only an opening wedge for more widespread demands by these and other possible users".[2] Our rules governing noncommercial educational broadcast service do not mention instructional programming, but do include among the kinds of programming permitted those "designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto." Hence in denying petitioner's proposal we do not rule against the broadcast of instructional programs. We deny only the use of noncommercial educational channels for the limited point-to-point programming in the technical manner proposed. Further, in denying petitioner's proposal, we suggest that parties interested in the limited distribution of instructional television

[2] Notice of Proposed Rule Making, released April 25, 1969 (FCC 69-440, 34 F.R. 7086).

programs investigate the use of cable television (CATV), instructional television fixed service (ITFS), multipoint distribution service,[3] and microwave.

6. Accordingly, IT IS ORDERED, that the subject petition of Community Television of Southern California, IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding (Docket No. 18535, RM–1365) IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] Notice of Proposed Rule Making, Docket 19493, released April 26, 1972 (FCC 72–360, 34 F.C.C. 2d 719).

F.C.C. 73-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TEMPORARILY AMENDING PARTS 89, 91 AND 93 OF THE COMMISSION'S RULES TO TEST THE PRINCIPLE OF SECONDARY FREQUENCY ASSIGNMENTS IN CALIFORNIA, TEXAS, AND THE CITY OF CHICAGO, ILL.	Docket No. 16259

ORDER TERMINATING PROCEEDING

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. In our Notice of Proposed Rule Making in this proceeding (30 FR 13965, November 4, 1965), we proposed to test the principle of secondary frequency assignments in the land mobile radio services. This was one of a number of studies instituted at the time looking for means of providing frequency relief for the land mobile radio services.

2. The proposal in this docket met with varied reactions. Some parties opposed the plan outright. Others, while not objecting to it, as such, asked that frequencies allocated in the services in which they operated be excluded from the test. Based on this response, we did not feel that the experiment would produce meaningful results; and we delayed its implementation pending further study and evaluation. In the interim, we have taken a number of actions allocating additional spectrum space to the land mobile radio services; and the possibilities for greater interservice sharing of land mobile radio frequencies are now being examined in connection with other current programs. Thus, the need for the program advanced in this proceeding no longer obtains.

3. Accordingly, IT IS ORDERED, That the proceeding in Docket No. 16259 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SHELL BROADCASTING, INC., NEW ALBANY, IND. For Renewal of License of Station WHEL	Docket No. 19120 File No. BR-2278
In Re Application of ROBERT H. BROWN, RECEIVER (ASSIGNOR) and WHEL, INC. (ASSIGNEE) For Voluntary Assignment of License of Station WHEL New Albany, Ind.	File No. BAL-7550

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has under consideration a pleading entitled, "Petition to Accept and Approve Application for Assignment of License," filed by WHEL, Inc.,[1] an Indiana corporation, on March 22, 1972. Inasmuch as the pleadings filed herein have been in somewhat unorthodox form and sequence, a brief review is deemed necessary to place the matter in perspective.

2. On July 1, 1966, the license of Station WHEL, a standard broadcast station at New Albany, Indiana, was assigned to Shell Broadcasting, Inc., the stockholders of which are Grady A. Sanders (87%) and James J. Nathan (13%). The license was renewed in 1967, but the application filed in 1970 for a further renewal of license was designated for hearing.[2] The issues, relating solely to Grady A. Sanders and his activities in connection with Station KGA of Spokane, Washington, seek to determine whether renewal of the WHEL license, in which he is the major stockholder, would serve the public interest, convenience and necessity. Nathan, the minority stockholder, and Station WHEL were in no way involved in any of the misconduct alleged as the basis for the designated issues. Hearing was held in Washington, D.C. during the week of July 5, 1971, and has been suspended since.

[1] WHEL, Inc., while bearing the call letters of the station under cognizance as part of its corporate title, is not the licensee but is the proposed assignee of the license. A supplement to the above-mentioned pleading was filed by WHEL on March 27, 1972.
[2] Memorandum Opinion and Order, FCC 71-38, released January 19, 1971.

3. Under circumstances not of record before the Commission, the Liberty National Bank and Trust Company, Louisville, Kentucky, instituted a receivership proceeding in the Indiana State Court of Floyd County.[3] Robert H. Brown was appointed Receiver and an involuntary assignment of license was granted by the Commission on December 6, 1971 (BAL–7456). After advertising the station and all of its assets for sale, the Receiver entered into an agreement with WHEL, Inc. to sell the assets, to assign the station license, and to use his best efforts to effectuate the assignment. Consideration for the sale is the assumption by the purchaser of the liabilities of Shell Broadcasting up to a maximum of $200,000. No provision is made in the agreement for the payment of any compensation for the stock interests of Sanders or Nathan. The agreement contains a severable provision for the assumption of liability of a promissory note to ASCAP [4] executed by Shell Broadcasting and by Sanders individually "if permitted by the FCC." Also included therein is a severable provision for assumption of certain liabilities of Shell Broadcasting to Grady Sanders, his successors and assigns, to the extent that such liabilities are determined by the Court to be valid claims against the corporation and "only if permitted by the FCC." Both the basic sales agreement, dated March 15, 1972, and an undated amendment thereto have been approved by the Floyd County Circuit Court "upon approval of the transfer by the Federal Communications Commission" and "subject to the approval of the Federal Communications Commission", under dates of March 15, 1972 and April 25, 1972, respectively.

4. The pleading filed by WHEL, Inc. requests only that the application for consent to assignment of the station license from the Receiver be approved. However, unless the pending renewal application is granted, the Receiver has nothing to assign; and it is the general policy of the Commission, in the absence of exceptional circumstances, to take no final action on an application for assignment of a license which is the subject of a renewal hearing involving the character qualifications of the licensee. Nevertheless no request has been filed in this docketed proceeding by a party thereto [5] for favorable action on the pending renewal application without hearing and for termination of the hearing. In an effort to remedy the situation, the Receiver filed a Statement on May 15, 1972, that he "joins and supports the petition of WHEL, Inc.," but no specific or further request for relief was contained therein. Despite these procedural irregularities, we have determined, in order to expedite the disposition of this case, to treat the pleading filed as a request in this docketed proceeding for a grant of the renewal application and termination of the hearing, as

[3] On July 1, 1966, a purchase money mortgage and note from Shell Broadcasting, Inc. to Kentuckiana Broadcasting, Inc. in the amount of $165,000 was executed. On July 29, 1966, the note was assigned and transferred to Liberty National Bank and Trust Company, plaintiff in the receivership action, *sub nom. Liberty National Bank and Trust Company* v. *Shell Broadcasting, Inc.*, Cause No. 41795. In the receiver proceeding, the bank filed a claim for $138,650.23.

[4] American Society of Composers, Authors, and Publishers. Liability arises under fees for performing licensed works over the air.

[5] WHEL, Inc. is not a party in the renewal hearing and its petition was directed solely to the assignment application which is not in hearing status.

well as for approval of the application for assignment of the WHEL station license to the purchaser of the assets of the bankrupt licensee.[6]

5. The dispositive question presented in this case is whether favorable action on the pending renewal and assignment applications is warranted under the doctrine enunciated in *Second Thursday.*[7] That doctrine may be stated as follows: despite the general rule that an assignment of license will not be authorized during the pendency of a hearing involving the character qualifications of a licensee, the Commission will permit such upon a showing that alleged wrongdoers will derive no benefit, either directly or indirectly, from the sale or will derive only a minor benefit which is outweighed by the equities in favor of innocent creditors. We shall evaluate the petition in that light.

6. The claims filed by creditors in the receivership total $212,574.20. However, we are concerned here only with those instances where satisfaction of the creditors' claims would confer benefits, either directly or indirectly, upon Grady Sanders, the only principal of Shell Broadcasting charged with wrongdoing.[8] The pleadings, comments of the Broadcast Bureau, and our own examination have disclosed several items which merit our attention.

7. A claim in favor of Grady Sanders and Myrle Smith, his mother, in the amount of $30,530.00 was timely filed in the receivership proceeding. Since Sanders is the alleged wrongdoer, the substantial and direct benefit which would result from the payment of so large a proportion of the total purchase price would preclude a finding that renewal of the WHEL station license without hearing and approval of the assignment application is in the public interest. Consequently, under the doctrine of *Second Thursday*, the possibility of such a benefit to the principal of a licensee charged with wrongdoing necessarily would require denial of the exceptional relief requested in the pleadings before us. However, that possibility has been eliminated by the claimants. In a document executed before a Notary Public on May 4, 1972, and filed with the Commission, Grady Sanders and Myrle Smith have agreed to "waive and forego all rights to pursue such claims in the receiver proceeding relative to Shell Broadcasting, Inc. before the Floyd County Circuit Court" if the Commission determines in ruling on the assignment application that payment of the claim would not be in the public interest. Upon the basis of this waiver and the representations of the claimants which establish that they will not share in the proceeds of the sale of the station, we conclude that the filing of this claim constitutes no bar to a favorable public interest finding with respect to the pending applications.

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[6] Other pleadings filed are as follows: (a) comments by the Broadcast Bureau filed on April 5, 1972; (b) a response filed by WHEL, Inc., on May 15, 1972; (c) supplement thereto filed on June 9, 1972; (d) comments of the Broadcast Bureau filed on June 12, 1972; and (e) a supplement thereto filed on June 14, 1972.

[7] *Second Thursday Corporation*, 22 FCC 2d 515 (1970) and 25 FCC 2d 112 (1970).

[8] The list of claims timely filed as certified by the clerk of the Floyd County Circuit Court includes a claim of James J. Nathan in the amount of $3,265.86. From other documents in the file it appears that this sum consists of "loans from stockholder"—$700.00; "commissions"—$1,065.86; and "accrued vacation pay"—$1,500.00. As recited previously, no question has been raised in this proceeding concerning the qualifications of James J. Nathan so that his claim is not a material consideration in the disposition of the matters now before us.

8. Other miscellaneous debts of Shell Broadcasting, the payment of which might benefit Sanders, have similarly been eliminated as possible impediments to a favorable public interest finding concerning the pending applications. The materials on file indicate that Station WHEL had broadcast spot announcements for American Bank in trade-out payment for obligations of either the station or Sanders personally. The broadcast of such advertising has been terminated. In any event, the American Bank, New Albany, Indiana, has filed a waiver of any claim in the receivership, regardless of its basis. The American Bank has not filed a claim in the receivership as reflected in the Clerk's certification. In like manner, Bluegrass Lincoln Mercury, Inc., which has been supplying autos to the station under a trade-out agreement, one of which has been in the possession of and used by Grady Sanders, has filed a waiver of any claim in the receivership by reason of such agreement and has not filed a claim with the Clerk. In view of these waivers, it is apparent that no part of the sale price of the station will be used to pay these creditors and that Sanders will be relieved of no liability with respect to the aforementioned obligations by reason of our approval of the renewal and assignment applications.

9. As shown in the Clerk's certificate of claims timely filed, ASCAP has a claim in the amount of $10,300. This obligation arises at least in part from a promissory note for $6,626 executed May 27, 1970,[9] by Shell Broadcasting, Inc. and Grady Sanders personally for the amount of the then delinquent license fees. With respect to this claim, the creditor has submitted a statement that in the event the Commission "in ruling on the petition to approve the assignment of license—should determine that it would not be in the public interest to pay" the aforementioned claim, it "waives and foregoes all rights to pursue its claim" against Shell Broadcasting, Inc. in the receiver proceeding. Liability to the Liberty National Bank and Trust Company, insofar as Sanders personally is concerned, arises from a note dated February 10, 1971, for $14,107.50 upon which the balance due is $8,107.50. It appears that the note represents an installment of interest on the purchase money mortgage which, Shell Broadcasting being unable to pay on time, was given by Sanders personally in addition and parallel to the obligation contained in the purchase money note and mortgage. The claim of Liberty National Bank filed in the receivership is for $138,650.23 and presumably includes the obligation duplicated by the Sanders note. On file with the Commission is a statement executed on behalf of this claimant which provides in pertinent part that if the Commission, in the disposition of the assignment application, determines that it would not be in the public interest to pay that portion of the claim represented by the personal note of Sanders, it "will reduce the amount of its claim in the receiver proceeding—by the sum of $8,107.50 and will look to Mr. Sanders for the payment thereof under his promissory note dated February 10, 1971."

10. In the absence of the waivers executed by ASCAP and Liberty National Bank and Trust Company, approval of the renewal and

[9] It is not clear whether the total sum due arises solely from this note or from the note and current license fee delinquencies. However, in view of our disposition of this claim it is unnecessary that the question be resolved.

assignment applications would relieve Sanders of his secondary liability on obligations of Shell Broadcasting totalling $14,733.50. Since the waivers are conditioned as set forth above, we are called upon to determine whether such an indirect benefit to an alleged wrongdoer precludes a finding that favorable action on the pending applications is inconsistent with the public interest. For the reasons set forth below, we do not believe that it does.

11. Excluding Sanders' claim, the total of claims filed in the receiver proceeding is $182,017.20 and, assuming all such claims are allowed by the Court, that is the sum which WHEL, Inc. would pay for the station under its agreement. The indirect benefit to Sanders which would result from approval of this transaction, therefore, amounts to approximately 8% of the purchase price. We believe this to be a minor benefit which is outweighed by the equities in favor of innocent creditors. Approval of the sale and assignment of license will permit almost full payment to a large number of creditors having substantial claims. In this connection we note that neither ASCAP nor the Bank is alleged to have been associated with any misconduct and they are likewise innocent creditors. Under the circumstances, we are persuaded that the indirect benefit which would accrue to an alleged wrongdoer from payment of the ASCAP and Liberty National Bank claims does not preclude a finding that a grant of the relief requested herein would be inconsistent with the public interest. On the contrary, we conclude that the public interest, convenience and necessity will be served by the renewal of the WHEL station license and its assignment to an acceptable assignee since substantial losses to innocent creditors will thereby be avoided and the continued and uninterrupted operation of this broadcast facility will be assured. See *Second Thursday Corporation*, 25 FCC 2d 112 at 114–115.

12. Processing of the application for assignment of the WHEL license (BAL–7750) has been completed. The proposed assignee is WHEL, Inc., the stockholders of which are local business and professional persons. The largest stockholder (32%) is James J. Nathan who is the minority stockholder (13%) in the assignor corporation. However, as noted *supra*, no question has been raised as to his qualifications. The assignee is legally, technically, financially, and otherwise qualified, and we find that a grant of the application will serve the public interest, convenience, and necessity.

13. Accordingly, IT IS ORDERED, That in light of the waivers set forth in paragraphs 7 and 8 herein, the application for renewal of license of Station WHEL, New Albany, Indiana, as filed by Shell Broadcasting, Inc., and as adopted by Robert H. Brown, Receiver, IS GRANTED; and,

14. IT IS FURTHER ORDERED, That the application for consent to voluntary assignment of license of Station WHEL, as filed by WHEL, Inc. and Robert H. Brown, Receiver, from Robert H. Brown, Receiver, to WHEL, Inc. (File No. BAL–7550) IS GRANTED; and

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15. IT IS FURTHER ORDERED, That the petition filed by WHEL, Inc. and adopted by Robert H. Brown, Receiver, IS GRANTED; and

16. IT IS FURTHER ORDERED, That the proceeding in Docket No. 19120 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-398

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN BROADCASTING CO. (WGHP-TV), HIGH POINT, N.C. For Renewal of Broadcast License	Docket No. 18906 File No. BRCT-574
FURNITURE CITY TELEVISION CO., INC., HIGH POINT, N.C. For Construction Permit for New Television Broadcast Station	Docket No. 18907 File No. BPCT-4302

MEMORANDUM OPINION AND ORDER

(Adopted December 27, 1972; Released January 2, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER WOULD ADD A LOG FALSIFICATION ISSUE. BOARD MEMBER KESSLER ABSENT.

1. By Order, FCC 70-706, 35 FR 11277, published July 14, 1970, the Commission designated the above-captioned mutually exclusive applications for hearing on a standard comparative issue. By Memorandum Opinion and Order, 26 FCC 2d 998, 20 RR 2d 689, released November 7, 1970, the Review Board added a promise versus performance issue against Southern Broadcasting Company (Southern), licensee of television Station WGHP-TV in High Point, North Carolina.[1] The Commission redesignated the applications for hearing by Order, FCC 72-147, 37 FR 4304, released March 1, 1972. Now before the Review Board is a petition to enlarge issues, filed May 30, 1972, by Furniture City Television Company, Inc. (Furniture City), requesting programming and staffing misrepresentation issues, as well as log falsification and log violation issues, against Southern.[2]

I. Timeliness

2. Furniture City argues that its petition is timely filed in accordance with Section 1.229(b) of the Commission's Rules and Regulations, although it was not filed within 15 days after publication of the redesignation Order in the Federal Register. The petition is still

[1] The issue reads as follows:

To determine whether Southern Broadcasting Company failed to carry out representations made in Docket No. 13072 as to programming, staffing, studios and equipment in operation of WGHP-TV, High Point, North Carolina, and, if so, the effect of such conduct on the requisite and comparative qualifications of Southern Broadcasting Company to be a Commission licensee.

The issue encompasses not only the latest license period (1966-1969), but also the 1963-1966 license period.

[2] Also before the Review Board are the following related pleadings: (a) opposition, filed June 9, 1972, by Southern; (b) Broadcast Bureau's opposition, filed June 9, 1972; and (c) reply, filed June 21, 1972, by Furniture City.

timely, Furniture City argues, because the photocopies of WGHP–TV's program logs, which provide the "raw data" for the requested issues, were not received until February 22, 1972, and three months have been required to analyze the 15,000 pages of logs to prepare this petition. The Broadcast Bureau contends that Furniture City has not adequately explained why it has taken three months from the date it received Southern's logs, February 22, 1972, until May 30, 1972, the date it filed its petition. Without further explanation, the Bureau argues, "the petition must be considered untimely and summarily dismissed." In reply, Furniture City asserts that three months was a reasonable time to analyze and compare Southern's 15,000 pages of program logs with its 16 volumes of exhibits. At the hearing held on March 3, 1971, Furniture City asserts, Southern "required nine months to one year" to examine the 15,000 pages of its own logs in order to prepare its exhibits.

3. The Review Board believes petitioner has shown good cause for the late filing of its petition with respect to the requested programming misrepresentation, log falsification, and logging rule violation issues. It does not seem unreasonable that it would take Furniture City three months to develop the allegations in its petition, due to the many pages and amount of detail involved in both the exhibits and the program logs. We do not believe, however, that good cause has been shown for the late filing of the staffing misrepresentation issue. Southern's assertion that it allowed petitioner to see and copy its payroll records on November 2 and 3, 1971, is uncontested by Furniture City. Petitioner's explanation for the late filing is premised on the receipt of Southern's program logs on February 22, 1972, but petitioner does not specifically mention when it received Southern's payroll and disbursement records. Furthermore, on the merits, petitioner has not alleged sufficient facts to warrant the addition of an issue. *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 148, 8 RR 2d 611 (1969). See paragraph 8, *infra.*

II. Misrepresentation of Programming and Staffing

4. In support of its requested issue concerning alleged misrepresentations in Southern's programming exhibits.[3] Furniture City asserts that portions of Southern's Exhibit 102, which is a month-by-month breakdown of Southern's programming for 1965 indicating types of programming and their origination (network, recorded or local live),[4] do not correspond with Southern's actual recorded logs. That is, the exhibit totals for local live programming do not correspond with the totals for the same programming in the logs, Furniture City asserts. According to petitioner, total local live public service programming for 1965 contained in the logs is 1167:46 minutes, while Southern claims in its exhibit a total of 1544:34 minutes of local live public service programming. In order to show the manner in which Southern

[3] The exhibits in question were prepared in response to the promise versus performance issue added by the Board in 1970. See paragraph 1, *supra.*

[4] Furniture City notes that Southern selected 1965 as the best representative year to present a breakdown of its programming into a detailed and comprehensive summary to meet the promise versus performance issue.

falsely represented the content of its program logs, Furniture City states that it studied the logs for the week of April 4–10, 1965. According to Furniture City, its analysis (a copy of which is attached to the petition) shows that, contrary to Southern's exhibit showing 32:07 minutes of live public service programs, the logs reveal that only 21:13 minutes were actually logged as public service programs. Furthermore, Furniture City maintains, Southern ignored the Commission's policy stated in *Television Program Forms*, 5 FCC 2d 175, 8 RR 2d 1512 (1966), and included commercials in its total times. As a corollary to the misrepresentations of program times, Furniture City argues, the log-exhibit analysis reveals that Southern changed some of its program classifications—for example, "Science All Stars", logged as "entertainment", appears in the exhibit as "educational"; "Around Town", logged as "entertainment", appears in the exhibit as "discussion". Furniture City states that it found nineteen such discrepancies. To support its request for a staffing misrepresentation issue, petitioner relies on Southern's Exhibits 134 and 135 as well as WGHP–TV's payroll records and station disbursements ledger. Exhibit 134 was submitted by Southern in response to that aspect of the promise versus performance issue that inquires into whether Southern had carried out the staffing proposals made in its initial application. The exhibit represents WGHP–TV's staff as of "March 15, 1965"; however, according to Furniture City, seven employees claimed to be employed on March 15 cannot be found in the payroll records or in the disbursement records. Furniture City argues that this discrepancy warrants addition of a staffing misrepresentation issue.

5. In opposition, Southern argues that the subject matter of both of Furniture City's requests is encompassed in the promise versus performance issue. In this regard, Southern alleges that at a pre-hearing conference held on October 27, 1971, it agreed to provide Furniture City with certain logs and payroll records. Thereafter, Southern continues, on November 2 and 3, 1971, Furniture City's counsel reviewed and copied program logs for programming periods including 1963, 1965 and 1966,[5] as well as payroll records for the same periods and for periods in 1964. Hearings began on December 9, 1971, and counsel for Furniture City cross-examined Philip Lombardo, present general manager of Station WGHP–TV, on the classification question. Southern acknowledges that some programs designated one way in the exhibit were designated differently in the logs; [6] however, in Southern's opinion, exploration of these inconsistencies is more properly left for cross-examination under the promise versus performance issue. Southern states that it cannot understand why Furniture City is raising the classification question at this time when exhibits were submitted eight months ago, cross-examination was conducted six months ago, and Furniture City was given all of Southern's logs three months ago. Next, Southern argues that it included commercial times in the programming length calculations represented in the exhibits because in

[5] Southern explains that its program logs for 1964 had been "disposed of".
[6] In its Exhibit 102, Southern stated that:
When an incorrect coding was given to a public service program, the content of the program was analyzed, and, based on its contents, the proper coding was assigned.

its original program proposals, Southern included commercial matter, which was *at that time* consistent with Commission policy.[7]

6. In its opposition, the Bureau notes that Southern explained in Exhibit 102, pp. 3–4, that some logs had programs that were occasionally coded incorrectly, and as a consequence thereof Furniture City's timing calculations, based on the actual logs, would differ from Southern's calculations in its exhibits which are "corrected" to the proper code. The Bureau asserts that the coding errors are presently under consideration at the hearing and that appropriate findings and conclusions can be drawn from this evidence under present issues; therefore, no new issue is warranted. As for the requested staffing misrepresentation issue, the Bureau states that it compared Southern's payroll record and disbursement ledger with Southern's Exhibit 134 and could find no discrepancy. The Bureau claims that it cannot be determined from Furniture City's showing who the seven unreported individuals are; therefore, no staffing misrepresentation issue is warranted.[8]

7. In reply, Furniture City insists that the requested issues cannot be dealt with by cross-examination under the present issues, and that cross-examination of Southern's sole witness through which the exhibits were offered into evidence only raised the suspicion that the exhibits did not accurately reflect the logs contents. In its *voir dire* cross-examination, Furniture City explains, it attempted to prevent the exhibits from being received into evidence. Furniture City argues that when the exhibits were accepted into evidence, any further cross-examination into their deceptive nature was mooted; therefore, the requested issues are necessary for a more thorough examination of the licensee's candor. Furniture City argues that the program reclassification admitted to by Southern is merely a "corollary" to the misrepresentation in time *amounts* in WGHP–TV's claimed public service programming. The issues requested, Furniture City asserts, are aimed at the discrepancies between Southern's exhibits and its logs, and not, as the Bureau seems to argue, at promise versus performance as such. With respect to the requested staffing misrepresentation issue, Furniture City again asserts that the Bureau has misunderstood its request by pointing out that the number of employees found in the payroll records and disbursements ledger exceed the numbers found in Southern's staffing exhibit. While it is true that the total number of persons contained in the payroll records and disbursements ledger exceeds the number in the exhibits, Furniture City argues, the seven employees are listed in the exhibits but cannot be found in the payroll records or disbursements ledger. Such carelessness, Furniture City finally argues, demonstrates Southern's lack of cooperation in this proceeding.

8. The Review Board is of the opinion that Furniture City has made sufficient allegations of fact concerning Southern's program

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[7] Southern notes that the Commission's policy, *Television Program Forms, supra*, excluding commercial matter in computing programming length, did not take effect until October, 1966, one month before the license period (1963–1966) ended.

[8] The Bureau notes that Furniture City's Attachment C, which is Southern's payroll and disbursement records, shows 75 permanent employees, and 40 free-lance employees as of March 15, 1965, whereas Southern's Exhibit 134 shows 74 full-time and 39 part-time employees as of March 15, 1965.

exhibits to warrant further exploration at the hearing under a separate issue. It appears from Furniture City's allegations that Southern may have inflated its live local public interest programming figures in its exhibits. According to Furniture City's figures, Southern's logs for 1965 reveal 1167:56 minutes of local live public service programming, while Southern's exhibit reveals 1544:34 minutes. This disparity of 376:88 minutes raises a serious question of whether Southern misrepresented its live public service programming to put itself in a more favorable position for securing a renewal. While we have some reservations about how Furniture City arrived at these figures, we are still persuaded to add the issue because we do not find Southern's opposition pleading to be responsive and enlightening with respect to the specific allegations raised by Furniture City. We appreciate the coding errors, Southern's candor in explaining how they occurred, and how the corrections affect the exhibits. However, Southern, in its responsive pleading, did not explain how the coding errors specifically relate to the substantial time disparity between the logs and the exhibits. On the basis of the foregoing, it appears that Southern may have misrepresented the exhibit figures. *Cf. Seaboard Broadcasting Corporation*, 26 FCC 2d 649, 20 RR 2d 786 (1970). Finally, in addition to its untimeliness, we believe there is no merit to Furniture City's request for a staffing misrepresentation issue. Furniture City premises its request on its alleged discovery that there were seven individuals listed in Southern's exhibits who did not appear in its payroll records and disbursement ledgers. Furniture City concedes, however, that more total employees are listed in the payroll records than in Southern's exhibit for March 15, 1965. Since the promise versus performance issue seeks an explanation as to why Southern retained only a staff of 79 at the time of its 1966 renewal and a staff of 73 at the time the present application was filed, when it proposed in its initial application a staff of 92 full-time employees, it would be to Southern's advantage to list as many employees as possible in its exhibits. We believe, therefore, that Furniture City has not shown any deliberate attempt by Southern to deceive the Commission to warrant addition of a staffing misrepresentation issue.

III. Log Falsification

9. Furniture City requests a log falsification issue against Southern on the ground that during the 1963–1966 license period Southern "regularly and frequently misclassified entertainment programs as public service programs." [9] Relying on the logs and Southern's Exhibits, Furniture City cites the following examples of false logging:

[9] Furniture City cites the following cases in support of its requested issue: *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813, reconsideration denied 17 FCC 2d 485, 16 RR 2d 30 (1969), affirmed 142 U.S. App. D.C. 70, 439 F.2d 580, 20 RR 2d 2126 (1971), cert. denied 403 U.S. 905; *KOKA Broadcasting Co., Inc.*, FCC 71–232, 21 RR 2d 981 (1971); *The Prattville Broadcasting Co.*, 4 FCC 2d 555, 8 RR 2d 120 (1966).

	Logged as entertainment	Logged as public service	Classification claimed in exhibits
Industry on parade	March–April, June 1 hr. 15 min.	October–November 45 min.	Talk.
ABC's nightlife	August–October 70 hrs. 15 min.	March–July 146 hrs. 53 min.	Discussion.
Accent	May 30 min.	March–April 2 hrs. 30 min.	Discussion, talk or news.
Around town	January–July 152 hrs. 15 min.	August–December 145 hrs. 08 min.	Discussion.
Harvesters	July–October 14 hrs.	November–December 6 hrs. 30 min.	Religion.
Championship bowling	October 1 hr.	January–April and October–December 17 hrs.	Talk.
Major league baseball	May–July 42 hrs. 40 min.	April, August–October 33 hrs. 50 min	Talk.

As a result of this "false" logging, Furniture City asserts, Southern increased its total 1965 public service broadcast time by 352 hours and 36 minutes or nearly 14%; consequently, "on paper", Southern appears to have an adequate amount of public service programming "which could be used to dispel any challenge which might arise to renewal of its license." Thus, Furniture City argues, Southern's logging practice violates Commission Rules 73.669–73.674, the Commission's television logging rules.

10. In opposition, Southern argues that the cases cited by Furniture City in support of its requested log falsification issue (see note 8, *supra*) are inapposite. In those cases, Southern notes, the broadcaster in question had deliberately altered or falsified its logs; for example, adding more public service announcements in the logs than were actually broadcast or failure to log the number and length of commercial spots, while, in this case, "certain program classifications were changed—not in the logs but exchange exhibits." Southern also contends that the public interest will be protected if the requested issue is denied because Furniture City's allegations are and will be the subject of cross-examination at the hearing. In its opposition, the Bureau argues that a false logging issue is not warranted because Furniture City has only shown that the logs used by Southern to prepare its exhibits contained errors. Southern, the Bureau notes, has admitted that inaccuracies exist in its logs. Also, the Bureau contends, Furniture City has submitted no affidavits from individuals having personal knowledge as required by Commission Rule 1.229(b).

11. In reply, Furniture City asserts that the heart of its requested log falsification issue centers on Southern's deliberate misclassification of its programming during 1963–1966. Corrections were made for the months of June, July and August, and a sheet dated October 27, 1965, with the corrections was attached to the logs, Furniture City asserts. Petitioner queries why Southern did not also make corrections for the rest of the months in that year.

12. The Board does not believe a log falsification issue is warranted. Simply put, Furniture City has not raised a substantial question as to whether Southern intentionally and deliberately falsified its logs. Compare *The Prattville Broadcasting Co., supra. KOKA Broadcasting Co., Inc., supra, Folkways Broadcasting, Inc.*, 23 FCC 2d 987,

21 RR 2d 163 (1972).[10] We note that Rule 73.670(a)(1)(i) requires the licensee of a television station to include within its logs "an entry identifying the program by name or title" and subsection (a)(1)(iii) and (iv) of Rule 73.670 requires the licensee to classify each program as to "type" and as to "source" respectively. In our opinion, however, the number of errors allegedly made by Southern in logging programs under Rule 73.670 are not so numerous as to suggest carelessness or inattentiveness to the Commission's logging rules which would warrant the addition of the issue. We have previously denied requests for issues predicated on alleged rule violations where, as here, only one rule was violated, no pattern of violation was shown, and the licensee corrected the violation (see, *e.g.*, *Harvit Broadcasting Corporation*, 33 FCC 2d 743, 23 RR 2d 479 (1972); Regal Broadcasting Corp., 27 FCC 2d 694, 21 RR 2d 61 (1971)),[11] and in our view, this precedent is applicable here.

IV. Logging Rule Violation

13. In support of its request for a logging rule violation issue, Furniture City asserts that Southern failed to delineate in its logs the beginning and ending times of its "weather news" and "sports news" programs throughout the months of March, June, October, November and December of 1965, and the months of January through April, June and July of 1966 for both the 7:00 p.m. and the 11:00 p.m. news programs in violation of Section 73.670(a)(1)(ii).[12] Therefore, petitioner argues, an issue concerning Southern's violation of the Commission's logging rules is warranted.[13] Both the Broadcast Bureau and Southern oppose the request, noting the pertinent part of the Commission's logging Rule 73.670(a)(1)(ii) provides that: "The program units *which the licensee wishes to count separately* shall then be entered underneath the entry for a longer program, with the beginning and

[10] In *Prattville* and *Folkways*, there was evidence in the form of affidavits and witness' testimony which strongly suggested that the licensee intentionally and deliberately falsified the airing of certain programs which were never shown or indicating a lesser time for commercial spots than they actually ran. Furniture City has not presented any allegation of fact suggesting that Southern actually falsified in its logs the broadcast of a program which was not broadcast.

[11] Petitioner notes that Southern had attached correction sheets to its station's logs correcting certain classification of programs mis-coded. Sheets, dated October 27, 1965, were attached to the logs showing corrections for the months of June, July, and August, 1965. We believe the correction sheets indicate a realization by Southern of errors in its logs and a willingness to correct the errors. Granted, correction sheets do not appear for every month; however, since these sheets could have been lost or misplaced, the absence of additional corrections does not indicate anything other than that Southern attempted to correct errors in its logs.

[12] Section 73.670(a)(1)(ii) of the Commission's Rules reads as follows:

> (a) The following entries shall be made in the program log:
>
> (ii) An entry of the time each program begins and ends. If programs are broadcast during which separately identifiable program units of a different type or source are presented, and if the licensee wishes to count such units separately, the beginning and ending time for the longer program need be entered only once for the entire program. The program units which the licensee wishes to count separately shall then be entered underneath the entry for a longer program, with the beginning and ending time for each such unit, and with the entry indented or otherwise distinguished so as to make it clear that the program unit referred to was broadcast within the longer program.

[13] Furniture City attaches to its petition Southern's program log for October 7, 1965, as an illustration of the failure to delineate the beginning and ending time of its weather news and sports news programs.

ending time of each such unit. . . ." Southern asserts that it chose not to count weather and sports separately. Clearly Rule 73.670(a)(1)(ii) leaves to the broadcaster's discretion whether he will indicate shorter unit programming time under longer programs in his logs.[14] Therefore, the Board finds no basis for the addition of this requested issue.

14. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed May 30, 1972, by Furniture City Television Company, Inc., IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

15. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine whether Southern Broadcasting Company (WGHP–TV) misrepresented to the Commission material matters with respect to its programming exhibits and, if so, whether such conduct reflects on the applicant's basic or comparative qualifications.

16. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence under the issue herein specified SHALL BE on Furniture City Television Company, Inc., and the burden of proof SHALL BE on Southern Broadcasting Company (WGHP–TV).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[14] We note that no provision of the television logging rules would require the licensee, once he has indicated shorter unit programming times under longer programs in his logs, to thereafter always so indicate his programming.

F.C.C. 73R-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN BROADCASTING CO. (WGHP-TV), HIGH POINT, N.C. For Renewal of Broadcast License	Docket No. 18906 File No. BRCT-574
FURNITURE CITY TELEVISION CO., INC., HIGH POINT, N.C. For Construction Permit for New Television Broadcast Station	Docket No. 18907 File No. BPCT-4302

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1973; Released January 12, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER DISSENTING WITH RESPECT TO THE REQUESTED RULE 1.526 AND THE INEPTNESS ISSUES.

1. Before the Review Board is a petition to enlarge issues, filed August 3, 1972, by Southern Broadcasting Company (WGHP-TV) (Southern) seeking the addition of Rule 1.65, Rule 1.526 and ineptness issues against Furniture City Television Company, Inc. (Furniture City).[1] Each issue will be considered separately.[2]

Rule 1.65 Issue

2. In support of its request, Southern alleges that Furniture City failed to amend Table II, Section II of its application (FCC Form 301) to reflect the interests of two Furniture City principals, J. Harriss Covington and Sidney A. Gayle, Jr., in a travel agency located in High Point, North Carolina, in contravention of Commission Rule 1.65.[3] In a supplement to its petition, Southern further alleges that Furniture City also failed to report that its principals Herman W. Bernard and John W. Thomas, Jr., hold stock in the High Point branch of the North Carolina National Bank. The Broadcast Bureau

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed August 15, 1972, by Furniture City; (b) Broadcast Bureau's comments, filed August 16, 1972; (c) reply, filed August 25, 1972, by Southern; (d) petition for leave to file supplemental pleading and supplement to petition, filed October 31, 1972, by Southern; (e) Broadcast Bureau's comments to (d), filed November 7, 1972; and (f) opposition to (d), filed November 13, 1972, by Furniture City.

[2] The Review Board will treat petitioner's petition as timely filed. It appears that the Rule 1.526 issue request is based on events that occurred on July 24, 1972, and that the ineptness issue is based on a series of events dating from 1969 to the present. It is unclear when Southern came into possession of the information upon which it bases its request for a Rule 1.65 issue. The Board, however, in light of a lack of strenuous opposition, will also consider the request for a Rule 1.65 issue as timely filed.

[3] According to the Articles of Incorporation attached to Southern's petition, the two principals are directors of Travels Unlimited of High Point, Inc., which was incorporated February 11, 1972.

supports Southern's request; however, the Bureau would consider this matter under the existing Rule 1.65 issue against Furniture City.[4] [5] In opposing the request, Furniture City alleges that: although the travel agency was incorporated on February 11, 1972, it did not go into business until May 9, 1972; Covington and Gayle are stockholders and not officers; and the two principals have other full-time occupations. In light of these facts, Furniture City argues that the information was not significant enough to report. Furniture City opposes Southern's petition for leave to file supplemental pleading as untimely filed.

3. The Review Board will grant the request in the initial petition to enlarge issues and will deny the request for leave to supplement. The existing Rule 1.65 issue against Furniture City will be considered broadened to encompass the applicant's alleged failure to report Gayle's and Covington's business interests. In a recent Memorandum Opinion and Order, FCC 72R-366, —— FCC 2d ——, released December 8, 1972, in this proceeding, we modified the existing Rule 1.65 issue [6] against Furniture City to encompass the applicant's failure to report all the business interests of seven of its principals. For the same reasons advanced in our previous Memorandum Opinion and Order, *supra*, the Board believes the existing Rule 1.65 issue should encompass the alleged failure of Furniture City to report Covington's and Gayle's business interests.

4. With respect to Southern's petition for leave to file a supplemental pleading, the Board stated in its Public Notice No. 90836, released October 11, 1972 (Filing of Supplemental Pleading Before the Review Board) that we would closely scrutinize all alleged justifications for the filing of supplemental pleadings. As the court stated in *Valley Telecasting Co., Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 169, 338 F.2d 278 (1964), with respect to late filed petitions before the Commission, it "cripples any decision making process and handicaps the agency in carrying out its functions." Petitioner's request to supplement its initial petition to enlarge issues comes three months after the filing of its initial petition and Southern has not presented a persuasive argument for the delay. Southern has not satisfactorily explained why it did not include this material in its initial petition. As the Broadcast Bureau points out, Bernard's interest was reported in the December 31, 1970, Directory of the North Carolina National Bank Corporation Subsidiaries and Thomas' interest was reported in the July 19, 1972, High Point *Enterprise*.

Rule 1.526 Issue

5. Southern requests a Rule 1.526 issue against Furniture City for its failure to maintain and make available for public inspection its file containing a copy of its application and related documents. As alleged in its supporting affidavits on July 24, 1972, at approximately 10:30 a.m., James H. Hoke and C. T. Leonard, Jr.,[7] requested (of the recep-

[4] See 33 FCC 2d 1044, 23 RR 2d 1197 (1972).
[5] The Bureau opposes Southern's petition for leave to file supplementary pleading to its petition to enlarge as untimely filed.
[6] See note 4, *supra*.
[7] Hoke is vice-president and chief engineer of Southern and Leonard is Station WHGP-TV's local counsel.

tionist-switchboard operator) to see Furniture City's inspection file at the location listed in the notice published in the local newspapers by Furniture City.[8] Southern's representatives were referred to a Mrs. Evelyn Lee who advised them that John Hutchens, who kept the file, was out of town. Mrs. Lee attempted, unsuccessfully, to locate the file and inquired of John Hutchens' brother as to its whereabouts, also without success. She stated that John Hutchens was expected back that day after 3:00 p.m. and suggested that Southern's representatives return later, first calling to see if John Hutchens had returned to his office. Southern's representatives left at 10:45 a.m. The Bureau supports the petitioner's request.

6. In opposing the request, Furniture City adds the following facts to those recited by Southern: The subject file has always been and still is available at its published location. Mrs. Evelyn Lee, John Hutchens'[9] secretary, familiar with the file but not its location when Hoke and Leonard made their request, attempted to locate it by asking George Hutchens, John Hutchens' brother and business associate, who informed her that only John Hutchens, away until that afternoon, knew the location of the file. To save Hoke and Leonard any inconvenience, Mrs. Lee suggested that they phone before returning to John Hutchens' office to determine if he was in. At 11:30 a.m. that day, George W. Lyles, Jr., president, director and 10% stockholder of Furniture City, was informed by Mrs. Lee of the Hoke-Leonard visit and, at 11:45 a.m., he attempted to contact representatives of Southern, first by calling the law firm with which Leonard is associated and then, at the suggestion of one of the attorneys, by calling Southern's Station WGHP–TV, to inform them that Furniture City's public inspection file was available. At the above station, he was advised that Leonard was with Philip Lombardo, the station's general manager. When Lyles sought to speak to Leonard, he was advised that Leonard had left. Lyles left a message as to the availability of the files with Lombardo's secretary and, on the same day, so advised Leonard by letter. Further, the regular receptionist who was on vacation that day was informed of the location of the file and was instructed to show the file to anyone who requested to view it if Hutchens was not present. Furniture City submitted supporting affidavits of John Hutchens, Frederica McDowell (the regular receptionist), Lyles and Lee. The statements set forth in these documents are substantially incontroverted.

7. The Review Board will deny the requested issue. No dispute exists over the fact that during the 15 minutes they were present, Hoke and Leonard were unable to obtain Furniture City's public inspection file at the place where it was supposed to be located and at a time (during regular business hours) when it was supposed to be available. Standing alone, these facts would ordinarily warrant the framing of a 1.526 issue. The Review Board believes, however, that the particular facts

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[8] Rule 1.526(d) specifies:

(d) Location of records. The file shall be maintained at the main studio of the station, or at any other accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed, and shall be available for public inspection at any time during regular business hours.

[9] John Hutchens, Secretary, director and 10% stockholder of Furniture City, "is charged by Furniture City with the responsibility of maintenance of its Public Inspection File. . . ."

here involved obviate the need for the requested issue. Although Hoke and Leonard were unable to obtain the subject file upon request, Southern did not establish that the file was not at Hutchens' office and that had Hoke and Leonard returned that same afternoon, they would not have been able to obtain the file. Compare *Jacksonville Broadcasting Company*, 26 FCC 2d 929, 20 RR 2d 626 (1970). Further it appears that Hutchens' secretary made a serious effort to locate the file and Lyles, after being informed of the Hoke-Leonard visit, went to considerable lengths that same day to inform Southern that the files were available (see paragraph 6, *supra*). Although it appears that Hoke and Leonard had no purpose in seeing the file other than to determine its availability and thereby determine Furniture City's compliance with Rule 1.526(d), their right to see it does not differ from that of any other interested party. While the Hoke-Leonard visit did raise a question as to whether Furniture City, on the day and at the time of the visit, was in technical violation of the rule, we believe that in the circumstances of this case, an issue is not warranted. *Ward L. Jones*, 7 FCC 2d 831, 9 RR 2d 1962 (1967).

Ineptness Issue

8. In support of its request, Southern alleges that the following violations of the Commission's Rules and Regulations by Furniture City establishes a pattern of carelessness and ineptness: (a) the failure to disclose eight business interests of its stockholders in its 1969 application in violation of Rule 1.514(a); (b) the failure to update Question 10(e), Section II of its application (FCC Form 301) to report the anti-trust suits brought by the United States of America against the Wachovia Corporation and The Wachovia Bank and Trust Company, N.A. in which several Furniture City principals are stockholders in violation of Rule 1.65; (c) the addition by the Review Board in its Memorandum Opinion and Order, 31 FCC 2d 790, 21 RR 2d 868 (1971), of an abuse of process issue against Furniture City for the manner in which it submitted a list of witnesses to be called at hearing; and (d) the addition by the Review Board of a Rule 1.65 issue in its Memorandum Opinion and Order, 33 FCC 2d 1044, 23 RR 2d 1165 (1972), for failure to report an anti-trust suit against a company in which one of its principals held an interest in violation of Commission Rule 1.65. Both the Broadcast Bureau and Southern oppose the request. The Bureau believes that the alleged disqualifying conduct is adequately covered by the existing issues; however, should the Board believe an issue is warranted, the Bureau suggests the matter be considered under the comparative issue.

9. The Review Board will deny Southern's request for an ineptness issue. In our opinion, petitioner's allegations cannot be said to demonstrate a pattern of carelessness, inadvertence, neglect, and indifference to the Commission's Rules and Regulations, nor does the totality of the allegations reflect adversely upon Furniture City's qualifications to be a Commission licensee. See *Media, Inc.*, 22 FCC 2d 886, 19 RR 2d 2 (1970); compare *Beamon Advertising, Inc.*, FCC 63R-467, 1 RR 2d 285 (1963). While a number of rule violations have been properly

raised by Southern, we believe the existing and separate issues previously specified by the Board (see paragraph 8, *supra*) sufficiently deal with the alleged violations. See *Home Service Broadcasting Corp.*, 22 FCC 2d 464, 18 RR 2d 972 (1970).

10. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed August 3, 1972, by Southern Broadcasting Company, IS GRANTED to the extent herein indicated, and IS DENIED in all other respects; and

11. IT IS FURTHER ORDERED, That the petition for leave to file supplementary pleading and supplement to petition to enlarge issues, filed October 31, 1972, by Southern Broadcasting Company, IS DENIED; and

12. IT IS FURTHER ORDERED, That the Rule 1.65 issue against Furniture City Television Company, Inc., added by the Review Board by Memorandum Opinion and Order (33 FCC 2d 1044, 23 RR 2d 1197, released March 22, 1972) IS BROADENED to include the matters as indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	Docket No. 19415
SOUTHLAND, INC., LAUREL, MISS., SOUTH JONES	File No. BPH-7405
BROADCASTERS, INC., ELLISVILLE, MISS.	Docket No. 19416
For Construction Permits	File No. BPH-7445

MEMORANDUM OPINION AND ORDER

(Adopted January 3, 1973; Released January 5, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the mutually exclusive applications of Southland, Inc. (Southland) and South Jones Broadcasters, Incorporated (South Jones) for authority to construct new FM broadcast stations at Laurel, Mississippi, and Ellisville, Mississippi, respectively.[1] The applications were designated for hearing by Commission Order, FCC 72-100, released February 8, 1972, on various issues, including a 307(b) issue and a limited financial qualifications issue against South Jones. Now before the Review Board is a petition to enlarge issues, filed May 24, 1972, by Southland, requesting expansion of the financial issue and the addition of lack of candor, misrepresentation and 1.65 issues against South Jones.[2]

2. Petitioner's request for lack of candor and misrepresentation issues stems from the alleged activities of Glynn E. Holland, president, director and stockholder of South Jones. Southland first notes that the engineering exhibit exchanged by South Jones was allegedly prepared by Holland in his capacity as engineer for the applicant, and that the exhibit contains Holland's signature, a statement of his qualifications as an engineer, and an affidavit that the exhibit was true and correct to the best of his knowledge and belief. However, petitioner asserts, since the exhibit refers to the combined 1 mv/m contour of Southland and the New Laurel applicant, which had already been dismissed, it is clear that some other engineer prepared the exhibit and that Holland did not even review it. Southland urges that further questions concerning Holland's candor are raised by a corrected exhibit, subsequently exchanged by South Jones. Petitioner notes that both the original and corrected exhibits contained affidavits notarized on April 17, 1972, thus evidencing, Southland avers, a contemptuous disregard for the obligation to be candid with the Commis-

[1] The competing application of New Laurel Radio Station, Inc. (New Laurel), for an FM station at Laurel, Mississippi, was dismissed with prejudice by Order of the Administrative Law Judge, FCC 72M-355, released March 17, 1972.

[2] Also before the Board are the following related pleadings: (a) opposition, filed June 7, 1972, by the Broadcast Bureau; (b) opposition, filed June 22, 1972, by South Jones; (c) supplement to opposition, filed July 5, 1972, by South Jones; and (d) reply, filed July 17, 1972, by Southland.

sion. The financial issue specified by the Commission against South Jones should be expanded, petitioner claims. South Jones allotted only $100 for engineering expenses, and, petitioner urges, since it appears that outside engineering counsel has been hired, the $100 budgeted is clearly insufficient. Finally, Southland urges that a Section 1.65 issue is warranted because South Jones did not list any outside engineering representative in its application, as required by the form.

3. In opposition, South Jones asserts that because Holland, a qualified engineer, was unable to obtain all of the facts necessary to prepare the engineering exhibits, he contacted another engineer, Claude M. Gray, and asked him to obtain the necessary data. Gray, South Jones alleges, contacted Robert L. Purcell, an engineer located in Washington, D.C., who could expeditiously gather the necessary information. However, South Jones contends, since Gray and Purcell did not know of the dismissal of the New Laurel application, the information gathered included the contours for that proposal. Holland, in an affidavit, explains that he neglected to tell Gray of the dismissal of New Laurel's application, and discovered the mistake when he got the materials back on April 16, 1972. After carefully reviewing all of the data prepared and being of the professional opinion that it was accurate except for the inclusion of New Laurel, Holland states, he prepared an affidavit which stated that the engineering exhibit was prepared under his direct supervision and was true and correct to the best of his knowledge and ability. Holland explains that he did not think that the other applicant or the FCC would object to the filing of the preliminary engineering data in this way, since there was not enough time to revise the exhibit (the deadline for exchanging the exhibit was April 17, 1972), and since the inclusion of the contours of the New Laurel proposal gave South Jones no advantage. Holland disclaims any intention of concealing any material facts or making any misrepresentations concerning the truth of either the affidavit or the exhibit. Affiant states that he used the original affidavit on the amended exhibit because he wanted to get the corrected material to the other parties as quickly as possible, and, in addition, he considered himself to be still under the original oath stating that the exhibit was prepared under his direct supervision and was true and correct to the best of his knowledge and ability. Affidavits of Gray and Purcell are also included which corroborate South Jones' version of the relevant events. With regard to the requested expansion of the financial issue, South Jones notes that it allocated $1,775 for "miscellaneous expenses", and alleges that it has paid Gray $666.78 for his services and has no other outstanding engineering expenses. Finally, in response to the requested Section 1.65 issue, South Jones urges that no consulting engineer, other than Holland, has been hired to *represent* it, and that therefore the requested issue is unwarranted.

4. In reply, Southland reiterates its request for lack of candor and misrepresentation issues, contending that the affidavits submitted with the opposition support the request. First, petitioner asserts that it appears from Holland's affidavit that he knew that the exhibit was erroneous when he swore to its correctness. Therefore, Southland contends, Holland's false swearing was deliberate, knowing and willful. Southland further contends that Holland could have avoided this

matter by requesting an extension of time beyond April 17, in which to mail out the exhibits, or by informing the Commission of the situation. Petitioner next contends that the admission by Holland in his affidavit that he had no contact with either Purcell or Gray is sufficient to warrant a candor issue with respect to Holland's assertion that he had direct supervision over the preparation of the exhibits. With respect to the corrected exhibit, Southland asserts that Holland's excuses for attaching the original affidavit are specious. According to Southland, Holland was slow in making the correction and did so only at the initiative of the two consulting engineers. Finally, Southland urges that there is a discrepancy between South Jones' exhibits, wherein it represented to the Commission that the proceeds of a bank loan were on hand on March 1, 1971, and other statements which reveal that the loan was not made until at least March 20, 1972.

5. Southland's petition will be denied. While it appears that Gray and Purcell assisted in the preparation of South Jones' engineering exhibits, we have no reason to doubt the assertions of Holland, Gray and Purcell, as set forth in their sworn affidavits, that the exhibits were prepared under the direct supervision of Holland. Petitioner's contentions to the contrary are all speculative. The only motive it suggests for concealing the participation of Gray and Purcell is the contention that to reveal their participation might affect South Jones' financial showing, and, as discussed *infra*, this contention is completely without merit. Nor do we find anything incredible about Holland's explanation as to why he submitted the incorrect exhibit. While the submission of an incorrect exhibit is clearly not to be applauded, it is also clear that no attempt was made to conceal the error, the error worked to the detriment of South Jones, and it was voluntarily corrected. We therefore view the applicant's conduct in this regard as negligent, but we find no basis for the addition of a lack of candor or misrepresentation issue. Holland's explanation as to why he submitted the original affidavit with the amended exhibit is subject to the same observations, *i.e.*, his explanation is reasonable, no motive has been suggested for concealing the facts, and no attempt was made to conceal the facts. Again, although this conduct may have been negligent, it is hardly an adequate basis for adding a lack of candor or misrepresentation issue. Petitioner's final challenge to South Jones' candor, the discrepancy in the dates on which the bank loan was made, was included for the first time in a reply pleading, and therefore will be rejected. As to the requested Section 1.65 issue, the Board agrees with South Jones that since neither Gray nor Purcell were hired to represent it, there is no requirement that their connection with the applicant be reported. Finally, petitioner's request for a financial issue is not supported by sufficient allegations of fact, as required by Rule 1.229. Moreover, any doubts which may have arisen by petitioner's allegations have been adequately dispelled by South Jones' responsive pleading.

6. Accordingly, IT IS ORDERED, That the further petition by Southland, Inc. to enlarge issues, filed May 24, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73M-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of SOUTHWESTERN BELL TELEPHONE CO. For a Certificate Under Section 214(a) of the Communications Act of 1934, as Amended, That Neither the Present nor Future Public Convenience and Necessity Will Be Adversely Affected by the Discontinuance of Toll Telephone Service During the First Half of 1974, to the Bourbon and Cuba, Missouri Exchanges of Missouri Central Telephone Company, the Leasburg, Missouri Exchange of Continental Telephone Company of Missouri, and the Steelville, Cherryville and Huzzah, Missouri Exchanges of Steelville Telephone Exchange, Inc. Upon the Establishing of Replacing Toll Telephone Service by Fidelity Telephone Company. Missouri Central Telephone Company, Continental Telephone Company of Missouri, and Steelville Telephone Exchange, Inc.	File No. P-D-318

ORDER AND CERTIFICATE

(Adopted January 4, 1973; Released January 11, 1973)

BY THE TELEPHONE COMMITTEE:

The Commission has considered the above application and all the facts and matters presented therein; and

IT APPEARING, That statutory notice of the filing of the subject application has been given as required by Section 214(b) of the Communications Act of 1934, as amended, and that public notice is not required by Section 63.90 of the Commission's Rules and Regulations to change the toll center for Bourbon, Leasburg, Cuba, Steelville, Cherryville and Huzzah, Missouri, and the point of interconnection with the Bell System's toll network;

IT FURTHER APPEARING, That toll telephone services will continue to be provided without interruption by Fidelity Telephone Company through its Sullivan, Missouri, toll center to the Bourbon and Cuba, Missouri exchanges of Missouri Central Telephone Com-

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pany, the Leasburg, Missouri exchange of Continental Telephone Company of Missouri, and the Steelville, Cherryville and Huzzah, Missouri exchanges of Steelville Telephone Exchange, Inc. over existing Sullivan-Bourbon-Leasburg-Cuba, Missouri cable and existing Cuba-Steelville, Missouri open wire of Southwestern Bell Telephone Company, and existing Steelville-Huzzah and Steelville-Cherryville, Missouri open wire of Steelville Telephone Exchange, Inc., with a change in the points of interconnection with the Southwestern Bell Telephone Company's toll network from Bourbon, Leasburg, Cuba and Steelville, Missouri to Sullivan, Missouri;

IT IS HEREBY CERTIFIED, That neither the present nor future public convenience and necessity will be adversely affected by the proposed discontinuance of toll telephone services to Bourbon, Leasburg, Cuba, Steelville, Cherryville and Huzzah, Missouri, by Southwestern Bell Telephone Company through its Union, Missouri, toll center;

IT IS ORDERED, pursuant to Section 0.215 of the Commission's Statement of Delegations of Authority, That the said application (File No. P–D–318) IS GRANTED and the applicant IS HEREBY AUTHORIZED to discontinue toll telephone services to Bourbon, Leasburg, Cuba, Steelville, Cherryville and Huzzah, Missouri through the Union, Missouri toll center at the time that Fidelity Telephone Company, Missouri Central Telephone Company, Continental Telephone Company of Missouri and Steelville Telephone Exchange, Inc. start to provide such services through the Sullivan, Missouri toll center of Fidelity Telephone Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SUBPART I OF PART 93 OF THE COMMISSION'S RULES TO REDEFINE ELIGIBILITY AND TO SPECIFY PERMISSIBLE LOCATIONS OF BASE STATIONS IN THE TAXICAB RADIO SERVICE	Docket No. 13690

ORDER TERMINATING PROCEEDING

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. This proceeding was initiated by our Notice of Proposed Rule Making (25 FR 7160, July 28, 1960) to amend the rules governing the Taxicab Radio Service. The purposes of the proceeding were to clarify the intent of certain regulations in force at that time and to restrict the practice of some eligible taxicab companies of selecting site locations designed to afford radio coverage greater than was actually needed or justified for their taxicab operations.

2. Upon review of the comments of the parties, and based upon our own reexamination of the matter in the context of our experience in the regulation of the Taxicab Radio Service in the interim period of time, we have concluded that the contemplated amendments should not be adopted at this time; and, therefore, that the subject rule making should be closed.

3. Accordingly, IT IS ORDERED, That the proceeding in Docket No. 13690 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: TELEVISION INCORPORATED, NORTH LITTLE ROCK, ARK., AND SHERWOOD, ARK. For Certificate of Compliance	CAC-467, CAC-468

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. Television Incorporated has filed applications for Certificates of Compliance to begin cable television service at North Little Rock and Sherwood, Arkansas, communities located within the Little Rock, Arkansas television market (the fiftieth largest). The following signals are proposed for carriage:

KARK-TV (NBC), Little Rock, Arkansas.
KATV (ABC), Little Rock, Arkansas.
KTHV (CBS), Little Rock, Arkansas.
KETS (Educ.), Little Rock, Arkansas.
KDTV (Ind.), Dallas, Texas.
KTVT (Ind.), Fort Worth, Texas.
KPLR-TV (Ind.), St. Louis, Missouri.

A 26 channel capacity system will be constructed, with two-way capability. Television Incorporated also submitted statements regarding its access program. These applications have been opposed by Leake TV, Inc., licensee of Little Rock station, KATV.[1]

2. Leake TV, Inc., opposes certification for the following reasons: (1) the franchises are, in certain particulars, inconsistent with the provisions of Section 76.31 of the Commission's rules; (2) the applicant has failed to advise the Commission of its plans to satisfy the program origination requirements of Section 76.201; (3) the access program is insufficient, as Television Incorporated did not specify that separate public access, educational and local government channels will be available in each community. These franchises have been awarded for 25 years and require an annual fee of $10,000 or four per cent of the North Little Rock system's gross subscription revenues; $750 or four per cent of the revenues of the Sherwood system. Although these franchises

[1] An earlier opposition was filed by Arkansas Television Company, licensee of KTHV, Little Rock. However, this opposition was later withdrawn, and its associated petitions for Special Relief (CSR-174, 175) styled the "Comments of Arkansas Television Company," were rendered moot.

were awarded long before the new cable television rules became effective—North Little Rock's franchise was granted October 12, 1970, Sherwood's franchise was issued November 23, 1970—Leake TV, Inc., contended that certification should be withheld until Television Incorporated can demonstrate full compliance with the franchise and access requirements of our rules.

3. In reply, Television Incorporated argued that its franchises substantially comply with Section 76.31, and that certification is therefore warranted until March 31, 1977. Its applications were supplemented to provide that separate public, educational and governmental access channels would be available in both communities. Finally, a statement was submitted which pledged the systems to substantially originate its own programming when they serve 3,500 subscribers.

4. As a consequence, there is but one issue that requires our disposition: do the franchises awarded Television Incorporated substantially comply with the provisions of Section 76.31? Paragraph 115 of the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), and Section 76.13(a)(3) of the Rules permit the processing of franchises granted prior to March 31, 1972 "so long as there is substantial compliance". Some definition to this concept was developed in *CATV of Rockford, Inc.*, FCC 72–1008, — FCC 2d —, and subsequent decisions. Judged against such criteria, there are no provisions in these franchises which are so objectionable as to compel denial or delay of certification. A short-term grant until March 31, 1977 should assure that the franchise defects emphasized by Leake TV, Inc., cannot extend beyond that date.

Accordingly, IT IS ORDERED, That the applications for Certificates of Compliance filed by Television Incorporated for North Little Rock and Sherwood, Arkansas ARE GRANTED.

IT IS FURTHER ORDERED, That the "Objection to Applications for Certificates of Compliance" filed by Leake TV, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the "Comments of Arkansas Television Company" ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1195

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: UNITED BROADCASTING CO. OF FLORIDA, INC. For Renewal of License for Station WFAB, Miami, Florida	Docket No. 19664 File No. BR-4447

ORDER AND NOTICE OF APPARENT LIABILITY

(Adopted December 20, 1972; Released January 2, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING.

1. The Commission has before it for consideration (a) the captioned application and (b) its inquiries into the operations of Station WFAB, Miami, Florida.

2. Information before the Commission raises serious questions as to whether the applicant possesses the qualifications to be or to remain licensee of the captioned station. In view of these questions, the Commission is unable to find that a grant of the renewal application would serve the public interest, convenience and necessity, and must, therefore, designate the application for hearing.

3. Accordingly, IT IS ORDERED, That the application IS DESIGNATED FOR HEARING pursuant to Section 309(e) of the Communications Act of 1934, as amended, at a time and place specified in a subsequent Order, upon the following issues:

(a) To determine whether, and, if so, the extent to which the applicant engaged in fraudulent billing practices in the operation of Station WFAB in violation of Section 73.1205 of the Commission's Rules;

(b) To determine whether, in the light of evidence adduced under the foregoing issue, the applicant possesses the requisite qualifications to remain a licensee; and

(c) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether the grant of the captioned application would serve the public interest, convenience and necessity.

4. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an order denying the captioned application for renewal of license for station WFAB, it shall also be determined whether the applicant has willfully violated Section 73.1205 of the Commission's Rules,[1] and, if so, whether an Order of Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, in the amount of $10,000 or some lesser amount should be issued for violations which occurred within one year of the issuance of the Bill of Particulars in this matter.

[1] See Bill of Particulars for specific dates and details of each alleged violation.

5. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forfeiture for violations of the Commission's Rules set out in the preceding paragraph. The Commission had determined that, in every case designated for hearing involving revocation or denial of renewal of license for alleged violations which also come within the purview of Section 503(b) of the Act, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we *stress* that inclusion of this Notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

6. IT IS FURTHER ORDERED, That in the event United Television Company, Inc. and United Broadcasting Company, Inc., are determined to be the otherwise qualified and preferred applicants in Docket Nos. 18559 and 18562, respectively, in re their applications for renewal of licenses of WFAN–TV and WOOK, the grant of the applications shall be withheld pending the resolution of the issue in this matter. United Television Company of New Hampshire, Inc., United Television Company of Eastern Maryland, Inc., and KECC Television Corporation are parties to a renewal and revocation proceeding involving, respectively, Stations WMUR–TV, WMET–TV and KECC–TV (Docket Nos. 19336–8). If it should be determined that the public interest would be served by allowing these licensees or applicants to operate or continue to operate these facilities, then the granting of such authority shall be withheld pending resolution of the issue in the instant proceeding. Further, in the event Friendly Broadcasting Company (Docket No. 19412) is determined to be qualified to continue to be the licensee of Stations WJMO and WLYT(FM), the grant of the applications for renewal of the licenses shall be withheld pending resolution of the issue in this matter. The resolution of the issues in this docketed proceeding shall be binding on any other licensee commonly owned or controlled with the captioned licensee and will be *res judicata* as to any such other licensee.

7. IT IS FURTHER ORDERED, That the Chief of the Broadcast Bureau is directed to serve upon the captioned applicant within thirty (30) days of the release of this Order, a Bill of Particulars with respect to issue (a).

8. IT IS FURTHER ORDERED, That the Broadcast Bureau proceed with the initial presentation of the evidence with respect to issue (a), and applicant then proceed with its evidence and have the burden of establishing that it possesses the requisite qualifications to be and to remain licensee of Station WFAB and that a grant of its application would serve the public interest, convenience and necessity.

9. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicant herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule and shall advise the Commission thereof as required by Section 1.594(g) of the Rules.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Order by Certified Mail—Return Receipt Requested to United Broadcasting Company of Florida, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1169

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re:	
VALLEY CABLE VISION, INC., DERBY, CONN., ANSONIA, CONN., SEYMOUR, CONN.	File Nos. CAC-115, CAC-116, CAC-119
TELESYSTEMS CORP., MERIDEN, CONN., PROSPECT, CONN., CHESHIRE, CONN., WOLCOTT, CONN., SOUTHINGTON, CONN.	File Nos. CAC-154, CAC-155, CAC-156, CAC-157, CAC-158
WATERBURY COMMUNITY ANTENNA, INC., WATERBURY, CONN., MIDDLEBURY, CONN., PLYMOUTH, CONN.	File Nos. CAC-179, CAC-180, CAC-181
GROSSCO CATV, INC., BRISTOL, CONN., FARMINGTON, CONN., PLAINVILLE, CONN., NEW BRITAIN, CONN., BERLIN, CONN.	File Nos. CAC-369, CAC-370, CAC-371, CAC-372, CAC-373
EASTERN CONNECTICUT CABLE TELEVISION, INC., NEW LONDON, CONN., EAST LYME, CONN., MONTVILLE, CONN., WATERFORD, CONN.	File Nos. CAC-534, CAC-535, CAC-536, CAC-537
LAUREL CABLEVISION, INC., TORRINGTON, CONN., LITCHFIELD, CONN., WATERTOWN, CONN., THOMASTON, CONN.	File Nos. CAC-906, CAC-907, CAC-908, CAC-909
NEW ENGLAND INDUSTRIES, INC., HARTFORD, CONN., BLOOMFIELD, CONN., EAST HARTFORD, CONN., WEST HARTFORD, CONN., SIMSBURY, CONN., WINDSOR, CONN.	File Nos. CAC-929, CAC-930, CAC-931, CAC-932, CAC-933, CAC-934
GREATER HARTFORD CATV, INC., MANCHESTER, CONN., GLASTONBURY, CONN., NEWINGTON, CONN., ROCKY HILL, CONN., WETHERSFIELD, CONN.	File Nos. CAC-944, CAC-945, CAC-946, CAC-947, CAC-948

NORTHWEST CABLEVISION, INC., WINCHESTER, CONN.	File No. CAC–1055
NEW MILFORD CABLE VISION CO., NEW MILFORD, CONN., BRIDGEWATER, CONN.	File Nos. CAC–1068, CAC–1069
CABLE VIDEO, INC., NORWICH, CONN., LISBON, CONN., FRANKLIN, CONN., SPRAGUE, CONN., BOZRAH, CONN.	File Nos. CAC–1133, CAC–1134, CAC–1135, CAC–1136, CAC–1137

For Certificates of Compliance

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. Because Connecticut law requires approval of the State Legislature to string wires across public streets or highways, municipal governments have not been able to grant cable television franchises. As a result of this unique local law, Connecticut was the first state to regulate cable television on a statewide basis. In 1963, the State enacted a statute (Conn. Gen. Stat. §§ 16–330–333), defining cable television as a public utility and placing it under the regulatory control of the State PUC. In July, 1964, the PUC issued an order of notice soliciting applications. Public notice appeared in newspapers throughout the state, and coverage was provided by other media. The PUC then held ninety-three Public hearings over a period of three years, filling 9,481 pages of transcript, and considering the financial, technical and character qualifications of all applicants. On March 21, 1967, the PUC awarded certificates to 17 applicants authorizing cable television service in 78 communities. On appeal, the award was affirmed. *Connecticut Television, Inc.* v. *PUC*, 159 Conn. 317, 269 A. 2d 276 (1970).

2. Eleven of the Connecticut cable operators have applied to the Commission for certificates of compliance for cable television systems in 43 communities. Connecticut Television, Inc., licensee of Station WHNB–TV, New Britain, Connecticut, has filed separate and distinct objections to each of these applications, and has filed a petition for special relief relating to most, but not all, of these applications. Broadcast Plaza, Inc., licensee of WTIC, has objected to each of the applications. In addition, Connecticut Educational Television Corporation (CETC), Boston Broadcasters, Inc., Licensee of WCVB–TV, and Capitol Cities Broadcasting Corp., licensee of WTNH–TV, have filed objections to certain of the applications.

3. On November 30, 1972, Connecticut Television filed a Motion to Consolidate asking that we consider the above-captioned applications on a consolidated basis. In support thereof, Connecticut Television states that "the principal questions to be resolved in these proceedings are, with some exceptions, the same." On December 11, 1972, New England Industries, Inc., one of the applicants, filed an opposition to the Motion.

4. Initially, we emphasize that there are substantial differences in the Connecticut applications. For example, most of the systems were not operational before March 31, 1972, and have filed pursuant to Section 76.13(a). Some, although not operational before March 31, 1972, were authorized to carry one or more signals before that date, and filed pursuant to Section 76.13(b). One of the applicants claims to have been in operation before March 31, 1972, and is proposing to add a signal pursuant to Section 76.13(b). Furthermore, although most of the communities fall within the Hartford-New Haven-New Britain-Waterbury market (the 19th largest market according to Section 76.5(a)), some are outside all markets. In addition, experience has shown that as our staff processes applications situations often arise such as failure to serve a person who should receive notification under our rules or amendments to the application. These usually delay the certification process. Consolidation of a group of applications would mean that a delay in processing one would probably inflict delay on all. Thus, in view of the patent differences in the applications and the latent differences that may surface during processing, we deny the motion to consolidate insofar as it asks us to consider all the above-captioned applications in a unified proceeding.

5. One of the objections raised by both Connecticut Television and Broadcast Plaza is that the franchise does not comply with our standards as stated in Section 76.31 of the Rules. Since all applicants operate under the same franchise, we can deal with those objections now to facilitate our subsequent processing of the individual applications.

6. The Connecticut franchise was issued prior to March 31, 1972, and hence the applicants need show only substantial compliance with our franchise standards. Section 76.13(a)(4), —(b)(3). In *CATV of Rockford, Inc.* FCC 72–1005, —FCC 2d— we stated that the term "substantial compliance" will be given liberal construction, since we are attempting to end the freeze on cable development and, in any event, there must be total compliance by March 31, 1977. The Connecticut franchise must be viewed in light of this standard. The Connecticut franchise was amended on November 10, 1972. Upon examination of the amended franchise we find that there is substantial consistency with Section 76.31 as follows:

(a)(1) Section 16–331 of the Connecticut General Statutes requires the PUC to consider "the suitability of the applicant . . . the financial responsibility . . . and the ability of the applicant to perform efficiently the service for which authority is requested", and states that the certificate shall be issued only after public hearing. The franchise recites that these standards were utilized by the PUC in choosing the franchisee and that there was public notice prior to the hearings. Notwithstanding the arguments in the objections filed by Connecticut Television and Broadcast Plaza, we are convinced that there was the "full public proceeding affording due process" required by Section 76.31.

(2) In its November 10 amendments, the PUC amended the franchise to require "significant construction within one year" of Commission certification and extension to "20 percent of its franchise area each year unless a different percentage is determined [by the PUC] to be reasonable." This complies with the requirement of Section 76.31(a)(2).

(3) On August 18, 1972, the PUC issued an order amending the franchise to provide that the franchise length is fifteen years (from March 31, 1972). In the November 10 Amendments, the PUC added a clause stating that the renewal period is five years. These provisions are consistent with Section 76.31(a)(3).

(4) The original franchise does not specify initial rates the subscriber may charge. However, each applicant was required to present "a projected income statement setting forth in detail an estimated annual income statement . . . over a future 10-year period." From this we might assume that initial rates were specified in the applications and approved as to those applications which were granted. In any event, any cable television operator in Connecticut is subject to jurisdiction of the PUC to the same extent as other public service companies [Sec. 16–1 Conn. Gen. Stat.] and must apply to the PUC for rate increases. Increases are awarded only after a public hearing. Thus the applications are in substantial compliance with Section 76.31(a)(4).

(5) In the November 10, 1972 amendments, the PUC prescribed specific procedures for the investigation and resolution of subscriber complaints and required franchisees to maintain a local office or agent in each city of their franchise. These procedures comply with Section 76.31(a)(5).

(6) There is no provision in the franchise stating that modifications of Section 76.31 will be incorporated into the franchise within one year of amendment by the Commission. Nonetheless, the PUC on its own motion has modified five aspects of the franchises to conform to our rules. A hearing was held on December 13, 1972, to consider further changes in the franchises.[1] Section 16–331(a) of the General Statutes of Connecticut provides that the PUC "may specify . . . from time to time . . . such terms and conditions as the public interest may require." In general, the PUC has shown willingness to conform its franchises to FCC standards.

(b) Public service companies operating in Connecticut pay an annual assessment towards the PUC's operating budget. This has in the past amounted to approximately .05 percent. In addition, public service companies pay a gross receipts tax of 8 percent which goes into the state's general fund. Connecticut Television and Broadcast Plaza have argued that the 8 percent tax is a franchise fee and hence not within the 3–5 percent limitation on franchise fees imposed by our Rules. We do not reach the question of whether a gross revenue tax imposed by a State on all public service organizations is a "franchise fee" within the meaning of our Rules. Rather, we hold that the 8 percent gross receipts tax to which cable systems are subject to pursuant to Connecticut law substantially complies with Section 76.31(b) of our Rules.

7. Accordingly, IT IS ORDERED, That the "Motion to Consolidate" filed November 30, 1972, by Connecticut Television, Inc., IS GRANTED to the extent indicated above and otherwise IS DENIED.

8. IT IS FURTHER ORDERED, That the "Opposition to Motion to Consolidate" filed December 11, 1972, by New England Industries, Inc., IS GRANTED to the extent indicated above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] On November 14, 1972, Broadcast Plaza, Inc., by letter to the Commission, asked that we withhold action on all Connecticut applications for certificates of compliance pending the outcome of a petition filed with the PUC on November 9 seeking further modifications of the Connecticut franchises. On November 20, the PUC, in response to Broadcast Plaza's letter, stated that the pendency of a rulemaking proceeding in Connecticut does not warrant further delay in our processing of the certification applications. On December 8, Eastern Connecticut Cable Television, Inc. and Cable Video, Inc. filed a "Motion to Strike" the November 14 letter from Broadcast Plaza pursuant to Sections 1.41 and 1.52 of the Commission's Rules. In view of our disposition of the main "motion to consolidate," we deny the request of Broadcast Plaza to delay certification and of Eastern Connecticut and Cable Video to strike Broadcast Plaza's letter.

F.C.C. 72-1007

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: VERTO CORP., SCRANTON, PA. For Certificate of Compliance	CAC-383

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1972; Released November 22, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONERS H. REX LEE, REID AND WILEY CONCURRING IN THE RESULT.

1. On May 10, 1972, Verto Corporation filed an "Application for Certificate of Compliance for Verto Corporation" (CAC-383) in which it proposes to construct a new cable television system at Scranton, Pennsylvania (population: 103,564 persons), which would offer subscribers the following television signals: WNEP-TV (ABC), Scranton, Pennsylvania; WBRE-TV (NBC), Wilkes-Barre, Pennsylvania; WDAU-TV (CBS), Scranton, Pennsylvania; WVIA-TV (Educ.), Scranton, Pennsylvania; WOR-TV (Ind.), New York, New York; WPIX-TV (Ind.), New York, New York; and WPHL-TV (Ind.), Philadelphia, Pennsylvania. Public notice of this application was given June 2, 1972. On July 3, 1972, Taft Broadcasting Company, licensee of Station WNEP-TV, Scranton, Pennsylvania, filed an "Opposition of Taft Broadcasting Company to Application for Certificate of Compliance" directed against the above-captioned application. On August 1, 1972,[1] Scranton Broadcasters, Inc., licensee of Station WDAU-TV, Scranton, Pennsylvania, filed an "Objection to Application for Certificate of Compliance" directed against the above-captioned application. The City of Scranton, Pennsylvania, on September 8, 1972, filed a letter in support of Verto's application. This was followed by Verto's "Amendment to Application for Certificate of Compliance for Verto Corporation" filed September 15, 1972. And on October 20, 1972, Verto filed its "Reply to Oppositions to Application for Certificate of Compliance."

2. In its Opposition, Taft argues that Verto's franchise (awarded in November, 1969) violates Section 76.31 of the Commission's Rules since it both requires a large lump sum payment in advance and requires a

[1] On July 3, 1972, Scranton Broadcasters filed a "Motion to Extend Time" which relied, in part, on the disruption caused by emergency broadcast operations necessitated by serious flooding in the area. Verto did not oppose the motion, and we find it appropriate to grant it.

fee ranging upward from 9.6% of gross income.[2] Taft argues that this fee is so excessive that the Commission can not find it to be in "substantial compliance" within the meaning of Par. 115, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366, and that no showing has been made that Verto made a significant financial investment or entered into binding contractual agreements prior to March 31, 1972, based on this franchise. In response, Verto supplies information to show that it is financially qualified to operate under the agreed franchise fee; that the City of Scranton has a local regulatory program which justifies the additional fees (the City's letter supports this view); and that, in any event, Verto has expended over $100,000 on the basis of this franchise and is therefore entitled to a grant until March 31, 1977, on this basis. We have carefully considered the arguments of Verto and the City of Scranton, but can not find on the present record that the franchise fee is in substantial compliance with either our rules or policies. Nor can we accept Verto's ability to pay the higher fee as decisive: should ability (or willingness) to pay such fees become the test, it is clear that we could no longer hope to enforce Section 76.31 of the Rules as a means of averting bidding contests for franchises. With respect to the alternative argument, however, we agree that the expenditure of more than $100,000 seems a significant financial investment which justifies grant of the requested certificate until March 31, 1977.

3. In its Objection, Scranton Broadcasters argues: that although Verto's application claims its franchise was awarded after a full public hearing in which the City "took into account" Verto's qualifications, the franchise does not contain the recitations called for by Section 76.31 of the Rules. Moreover, Scranton Broadcasters offers an affidavit of James A. Doherty, member of the Council of the City of Scranton, which sets forth his view that the Council did not have adequate information about Verto when it was awarded the franchise.[3] Consequently, Scranton Broadcasters urges several issues it claims should now be decided by the Commission. Although we have considered these

[2] Section 5 of the ordinance effectuating the franchise provides that,

(a) "Verto Corporation shall pay to the City of Scranton for and in consideration of the granting of said franchise the following: (a) Franchise fees. A percentage of its gross income according to the following schedule:

1st $400,000.00— 9.6% thereof
Next 100,000.00—10.8% thereof
Over 500,000.00—12.0% of all revenue up to $500,000.00
Over 600,000.00—12.0% of the first $500,000.00
and
13.2% of the next $100,000.00
Over 700,000.00—12.0% of the first $500,000.00
13.2% of the next $100,000.00
14.4% of the next $100,000.00

The above formula is to be carried out on an upward, progressive basis of an additional 1.2 percentage points for each additional One Hundred Thousand ($100,000.00) Dollars in income.

If percentage of gross revenue payable to the City does not result in the minimum payment of Ten Thousand ($10,000.00) Dollars in the First Year of operation, Fifteen Thousand ($15,000.00) in the second year of operation, and Twenty Thousand ($20,000.00) in the third and subsequent years of operation, then Verto Corporation shall pay to the City of Scranton the said sums computed by the application of the proper percentage rates plus the difference between the said gross and the minimum payments herein specified.

(b) In addition to the above payments, Verto Corporation shall pay to the City of Scranton, upon the granting of the said franchise, a lump sum of Fifty Thousand ($50,000.00) Dollars."

[3] Mr. Doherty was the dissenting member when Verto was awarded the franchise by a 4–1 vote of the Council.

objections, it appears in fact that there is no real claim of inadequacy in Scranton's procedures and that the only issue is that we are invited to substitute our judgment for that of the Council of the City of Scranton. But we decline either to substitute our judgment for the Council's or to invade its deliberations. Consequently, we conclude that—as with the fee issue discussed in the preceeding paragraph—consistency with our various requirements need not be required before March 31, 1977. *Id* at 375.

In view of the foregoing, the Commission finds that a grant of the above-captioned application will be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition of Taft Broadcasting Company to Application for Certificate of Compliance" filed July 3, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed August 1, 1972, by Scranton Broadcasters, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–383) for certificate of compliance filed by Verto Corporation IS GRANTED in accordance with a certificate of compliance to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: VIDEO INTERNATIONAL, INC., LEON COUNTY, FLA. For Certificate of Compliance	CAC-663 FL224

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. Video International, Inc., has applied for a Certificate of Compliance (CAC-663) for a cable television system to operate in certain unincorporated areas Leon County, Florida, which is located in a smaller television market. The applicant proposes to carry the following television signals:

WCTV (CBS), Tallahassee, Florida.
WJHG-TV (NBC), Panama City, Florida.
WDHN (ABC), Dothan, Georgia.
WALB-TV (NBC/ABC), Albany, Georgia.
WFSU-TV (Educ.), Tallahassee, Florida.
WABW-TV (Educ.), Pelham, Georgia.

This application is opposed by Dr. David J. LeRoy, Assistant Professor of Communications at Florida State University.

2. Dr. LeRoy objects to the fact that the Leon County, Florida County Commission granted Video International a "License and Permit" to utilize county rights-of-way in order to commence cable television service, and has not issued a franchise. As a consequence, the county license simply concerns itself with the conduct of cable television operations along these rights-of-way, and the requirements of Section 76.31 of the Commission's Rules are not mentioned. Moreover, Dr. LeRoy contends that the Board of Commissioners "abrogated their fiduciary role" in failing to observe the "required due process features" of the new cable television rules; he states that the license and permit was issued "without a public hearing for those directly involved in the service, much less allowing those citizens in the excluded or skimmed areas a voice in the decision process."

3. Attached to the application are representations made by Video International to the Leon County Board of Commissioners, which state that the provisions of Section 76.31(a)(2)-(6) of the Rules will be adhered to. Video International obliges itself to accomplish significant construction of the system within one year of FCC certifi-

cation; agrees to a limitation of the permit to 15 years; promises that its initial installation and service charges will not exceed prevailing rates, and that no changes in these rates will be effective except as authorized by the County Board of Commissioners after a public proceeding; specifies a series of procedures for the investigation and resolution of subscriber complaints; and promises to comply with any modification of FCC rules within one year. The County Attorney has advised the Commission that the Board of County Commissioners has the authority to regulate cable television by franchising "or such other method as the Board deems appropriate." A right-of-way permit was issued because the Board did not believe it was necessary to enter into "actual franchising arrangements." So long as existing cable television systems in the county provide satisfactory service at reasonable rates, the Board did not wish to involve itself in a proceeding which would add additional costs to the cable system and local government.

4. It is contemplated by the Cable Television Rules that something other than a formal franchise may be submitted by an applicant for our certification; Section 76.31(a) speaks of "a franchise *or other appropriate authorization*" (emphasis added). And as we indicated in Par. 116, *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, when a question arises as to the sufficiency of a local authorization, we will approach the matter on a case-by-case basis. The combination of a license to utilize county rights-of-way to construct trunk line for cable—the only authorization obtainable—and representations that the substance of our Rules, specifically Section 76.31, will be observed, is here an acceptable substitute for the submission of the franchise our rules will ordinary require. *Inter alia*, we are satisfied that a public proceeding attended the award of this permit. Dr. LeRoy himself describes two meetings conducted by the Board of Commissioners. It appears that there was opportunity at these meetings to present objections. However, we believe the public interest will best be served if an issuance of a certificate of compliance is conditioned upon the submission of an appropriate franchise from the Leon County Board of Supervisors. As this body has indicated, through the County Attorney, that it could issue a franchise if directed to do so by this Commission, we do not think this places a difficult task before Video International.

In view of the foregoing, the Commission finds that grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORERED, That the application for Certificate of Compliance, (CAC–663) filed by Video International, Inc., is GRANTED, and an appropriate Certificate of Compliance will be issued.

IT IS FURTHER ORDERED, That, the objection filed by Dr. David J. LeRoy, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-023—73——9

F.C.C. 73 R–9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ROBERT COWAN WAGNER, PINEVILLE, LA.	Docket No. 19473 File No. BP–18465
SOUTHEAST ARKANSAS RADIO, INC., DERMOTT, ARK. For Construction Permits	Docket No. 19474 File No. BP–18476

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1973; Released January 10, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition for reconsideration,[1] filed April 24, 1972, by Southeast Arkansas Broadcasters, Inc., (KVSA) [2] which seeks addition of a *Carroll*[3] issue against Southeast Arkansas Radio, Inc. (Southeast).[4]

2. Initially, petitioner notes that the Commission, in the designation Order in this proceeding, refused to specify a *Carroll* issue against Southeast, because KVSA had failed to allege sufficient, specific data in support thereof.[5] However, KVSA explains, at the time its informal objections were filed it did not have the benefit of counsel, and petitioner indicates that the present pleading is submitted for the purpose of expanding the factual showing. KVSA now supplies various population and economic data, including the population figures of McGehee, KVSA's city of license, Dermott, Southeast's proposed city of license,[6] and the counties in which each city is located, as well as the respective county revenues, retail sales and number of stores. Also included is a breakdown of the sources by area of KVSA's revenues, and a description of KVSA's competition from other stations in the area. KVSA, after noting that it showed an operating net loss of $116 in 1971, alleges that "for a small-town station" it does a significant

[1] Although this petition was initially directed to the Commission it does not meet the requirements for a petition for reconsideration (see Section 1.111 of the Commission's Rules) and is, in substance, a motion for enlargement of issues. Accordingly, it was informally referred to the Review Board for consideration. *Florida-Georgia Television Company Inc.*, 12 FCC 2d 332 (1968).

[2] By Order of the Administrative Law Judge, FCC 72M–568, released May 1, 1972, KVSA's petition to intervene was granted and KVSA was made a party to this proceeding.

[3] *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).

[4] Also before the Board are the following related pleadings: (a) opposition, filed May 9, 1972, by Southeast; (b) opposition, filed May 8, 1972, by the Broadcast Bureau; and (c) reply, filed June 2, 1972, by KVSA.

[5] FCC 72–235, released March 24, 1972. The Commission stated that "KVSA's claim of economic harm is conclusory in nature and contains no specific data related to the economics of broadcasting which would tend to show that another station in the Dermott area would result in a net degradation of service to the public."

[6] Dermott, and McGehee are seven miles apart and KVSA's studios and transmitter are located midway between.

amount of local programming,[7] and that the addition of another, more powerful, station in the area would reduce its revenues and thereby weaken KVSA's programming, which, in turn, would result in two inferior stations.

3. The requested *Carroll* issue will be denied. The Review Board, disregarding a discussion of possible procedural difficulties raised by this petition (see footnote 1, *supra*), agrees with Southeast and the Broadcast Bureau that KVSA's substantive showing fails to raise a substantial or material question of fact. While it is true that petitioner need not demonstrate a "pre-knowledge of the exact economics of the situation," *Folkways Broadcasting Company Inc.* v. *FCC*, 126 U.S. App. D. C. 123 at 127, 375 F. 2d 299 at 303 (1967), it is the Board's opinion that petitioner has not supplied adequate data to raise a substantial question as to "whether the economic effect of a second license in this area would be to damage or destroy service *to an extent inconsistent with the public interest.*" *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. at 349, 258 F. 2d at 443. [Emphasis supplied]. For example, KVSA had made no showing as to the number of area businesses which do not advertise at present, and are, therefore, potential sources of additional advertising revenues. Nor is there any showing as to the specific relationship between its possible loss of future revenues and the competition from the proposed Southeast station. Much more important, however, KVSA has failed to provide any data reflecting the expenses of its own local and public service programming, and the relationship of such programming to its revenue potential. *Maumee Valley Broadcasting, Inc.*, 33 FCC 2d 317, 23 RR 2d 618 (1972). For example, KVSA has not shown whether such programs, many of which are "one-time" in nature, are commercial or sustaining, or the savings which could be effected if such programs were dropped or shifted. The significance of this omission is that it is impossible to determine the impact of a possible future loss in revenues on KVSA's ability to provide adequate public service programming. Absent such a showing, which is the primary basis for a *Carroll* issue, petitioner's request must be denied. *WLVA, Inc.* (*WLVA-TV*) v. *FCC*, — U.S. App. D.C. —, 459 F. 2d 1286, (1972), *Maumee Valley Broadcasting, Inc.*, *supra;* and *Carroll Broadcasting Co.* v. *FCC*, *supra.*

4. Accordingly, IT IS ORDERED, That the petition for reconsideration [enlargement of issues], filed April 24, 1972, by Southeast Arkansas Broadcasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[7] KVSA carries approximately one hour per week of public affairs programming and over nine hours a week of "all other" programs, exclusive of entertainment and sports.

F.C.C. 72-1155

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released December 26, 1972)

BY THE COMMISSION:

1. The Commission [1] has before it for consideration a "motion to strike prejudicial portions of an amendment tendered by Valley after designation of the Western license renewal application" filed on November 8, 1972, by Western Communications, Inc. (Western); oppositions thereto filed respectively by the Chief, Broadcast Bureau, on November 16, 1972, and by Las Vegas Valley Broadcasting Co. (Valley) on November 21, 1972; and a reply to oppositions filed December 5, 1972, by Western Communications, Inc.

2. In its motion, Western claims that its comparative position has been unfairly prejudiced by the Commission's acceptance of an amendment filed as of right by Valley at a time when Western's application was in hearing status but when Valley's application was not. A brief statement of the history of this proceeding will facilitate an understanding of the parties' contentions.

3. The Commission conducted a field inquiry which revealed possible irregularities in the operation of television station KORK-TV, licensed to Western on Channel 3 at Las Vegas, Nevada. After Western filed its license renewal application for KORK-TV, Valley filed an application for a construction permit seeking authorization for a new television broadcast station on Channel 3 at Las Vegas. On March 9, 1972, while these applications were pending, Western and Valley filed with the Commission a settlement agreement which contemplated: (a) the filing of an application for approval of an assignment of the

[1] The Administrative Law Judge ruled that he does not have jurisdiction of Valley's amendment because it was accepted prior to designation of the application for hearing. The mere fact that the subject interlocutory request involves an amendment accepted prior to designation for hearing did not foreclose the Judge's ruling on the motion to strike portions of the amendment. See Section 0.341(a) of the Rules and *Fox River Broadcasting Co.*, 5 FCC 2d 669 (1966), which also involved predesignation amendments. While we could dismiss the pleadings now before us, we shall consider their merits in this instance so that the hearing may proceed in an orderly manner.

KORK–TV license to a new corporation which would be owned half by Western and half by Valley; (b) that the Commission would withhold action on the pending applications until the assignment application is filed and approved; (c) that the KORK–TV renewal application would be granted simultaneously with the assignment application; (d) that Valley's application for construction permit would then be withdrawn; and (e) that either party could terminate the agreement should either of the then-pending applications be designated for hearing.

4. On June 9, 1972, the Commission adopted an order [2] which held that the inquiry into Western's operation of KORK–TV and the licensee's responses to the Commission inquiry raise questions regarding Western's qualifications to continue as a licensee of KORK–TV; that a hearing is required to resolve these questions; that it would not be in the public interest to defer action on the renewal application as contemplated by the settlement agreement; that since the settlement agreement provided for its termination by either party in the event one of the applications should be designated for hearing, Valley should advise the Commission whether it proposes to prosecute its application in the comparative hearing; and that, should Valley so elect, its application would then be designated for consolidated hearing with Western's application. On June 22, 1972, Valley advised the Commission that it had notified Western that the settlement agreement was terminated, and that it proposed to prosecute its application. Shortly thereafter, on June 28, 1972, Valley filed as of right an amendment to its application, which, in view of the nonhearing status of the application, was accepted under the provisions of Section 1.522(a) of the Rules. On August 29, 1972, the Commission adopted a designation order [3] consolidating the two applications in a comparative hearing.

5. In its motion to strike portions of Valley's amendment filed June 28, 1972, Western now contends that it has been unfairly treated because Valley was permitted to amend its application as of right while Western's application was in hearing status and could only be amended upon a showing of good cause. Western asserts that our action granting Valley's amendment contravenes fairness requirements under *Ashbacker Radio Corporation* v. *F.C.C.*, 326 U.S. 327 (1945). Western requests that Valley be required to show good cause for acceptance of its amendment and, in the absence of an adequate showing, that prejudicial portions of the amendment be stricken. Western further contends that Valley's June 28, 1972, amendment in certain respects was comparatively advantageous to Valley; and that the amendment was thus prejudicial, and should be disallowed.[4]

6. The Broadcast Bureau opposes the motion on the ground that Western has not been prejudiced by the procedures followed in this proceeding. Valley also opposes the motion on the grounds that the

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[2] Commission Order, Mimeo #79373, FCC 72–503, released June 12, 1972.
[3] Order of the Commission, Mimeo #80213, FCC 72–767, released September 1, 1972.
[4] Western relies upon *Athens Broadcasting Co.*, Mimeo No. 90324, FCC 72R–262, released September 28, 1972, as proscribing the acceptance of an amendment of this nature after the comparative hearing was begun.

amendment was not prejudicial to Western; that what Western seeks is untimely reconsideration of the designation order; and that a retroactive change of the date of designation for hearing which in effect is being sought by Western is not contemplated under Section 1.106 of the rules.

7. In reply to the oppositions, Western asserts that Valley's amendment deleted Aaron Gold as a 5% principal, and reported that half of Gold's stock was acquired by James Rogers, who is Valley's president; that although Valley in its opposition asserts that it does not propose fulltime integration of Rogers, it is not clear that the extent of Rogers' participation will not afford Valley a comparative plus under the integration proposal; that Gold has petitioned for discharge of debts in voluntary bankruptcy proceedings; and that Western has pending before the Commission's Review Board a petition to add a financial issue on the basis of Gold's inability to effectuate his financial commitment to Valley, which is prejudiced by allowance of Valley's amendment as of right. Valley requests that the Commission exercise its discretionary power to strike these portions of Valley's amendment and preclude procedural unfairness to Western, and to accept such amendment only upon a showing of good cause for the allowance thereof.

8. Western's motion will be denied. The Commission may withhold immediate consolidation where the facts warrant. See *Mansfield Broadcasting Co.*, 4 FCC 2d 154 (1966). Here, it was not apparent at the time Western's application was designated for hearing that a comparative hearing was required and this uncertainty was created by the settlement agreement whose terms were set by Western and Valley themselves.

9. No unfairness redounded to either party as a result of the procedures followed in inaugurating this proceeding. The Commission is not required under *Ashbacker Radio Corp.* v. *F.C.C. supra*, to maintain the status quo with respect to all facts which may be relevant to a determination of a pending application, and an applicant is not denied his *Ashbacker* rights whenever, during the pendency of his application, the Commission takes action otherwise within its authority, even if one of the consequences may be to lessen the probabilities in favor of a grant of the pending application. See *Gala Broadcasting Co.*, 11 FCC 2d 40 (1967), modified in other respects, FCC 68–512, released May 15, 1968, 13 RR 2d 103. In its motion, Western recognizes that during a period of ten months following the filing of Valley's application, both parties were on notice that a comparative hearing might be required, and either party could have amended its application as of right. The delay in designating Valley's application for hearing, occasioned by the provisions of the settlement agreement, was justified in the circumstances noted above, and Valley, in submitting an amendment to its application did no more than is expected of all applicants under Section 1.522(a) of the Rules. Thus, Western has not been inequitably treated by our order consolidating Valley's amended application for hearing with Western's at a date subsequent to the designation of Western's application. Moreover, Western has

not advanced cogent reasons for departing from the provisions of Section 1.522(a) of the Rules. The motion will, therefore, be denied.

10. Accordingly, IT IS ORDERED, That the "motion to strike prejudicial portions of an amendment tendered by Valley after designation of the Western license renewal application," filed November 8, 1972, by Western Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted January 2, 1973; Released January 4, 1973)

BY THE REVIEW BOARD:

1. By Order, FCC 72-503 (37 FR 12346, published June 22, 1972), 35 FCC 2d 517 the Commission designated for hearing the application of Western Communications, Inc. (Western) for renewal of its license to operate Station KORK-TV, Las Vegas, Nevada, on fraudulent billing and misrepresentation issues. Thereafter, by Order, FCC 72-767, released September 1, 1972, the Commission redesignated Western's application for hearing, together with the mutually exclusive application of Las Vegas Valley Broadcasting Co. for a new television broadcast station in Las Vegas. On August 11, 1972, Western filed the instant motion to enlarge issues; a supplement to the motion to enlarge issues was filed by Western on August 22, 1972.[1]

2. Western requests the Board to enlarge the issues in this proceeding to include the following issues:

To determine whether the programming of Station KORK-TV has been meritorious, particularly with regard to public service programs.

To determine, if in light of the evidence adduced pursuant to the foregoing issues the hearing record does not warrant denial of the renewal application, whether any willful or repeated violations of Section 73.1205 of the Commission's Rules (as specified in the July 12, 1972, Bill of Particulars) have occurred and, if so, to recommend to the Commission whether a forfeiture should be issued against the licensee pursuant to Section 503(b) of the Communications Act, the applicant having expressly waived the one-year statute of limitations of Section 503(b)(3) of the Communications Act with respect to the alleged violations of Section 73.1205 of the Commissions Rules, as specified in the July 12, 1972, Bill of Particulars.

[1] The Review Board also has before it: an opposition to the motion to enlarge issues, filed by Valley on August 24, 1972; a petition for leave to file an opposition, filed August 24, 1972, by Valley; the Broadcast Bureau's comments on motion to enlarge issues and supplement to motion to enlarge issues, filed August 29, 1972; an opposition to supplement to motion to enlarge issues, filed by Valley on September 5, 1972; an opposition to Valley's petition for leave to file and conditional reply to Valley's opposition, filed by Western, September 6, 1972; Western's reply to Broadcast Bureau's comments, filed September 11, 1972; and a conditional reply to Valley's opposition to supplement to motion to enlarge issues, filed by Western on September 15, 1972. Since the Commission and all parties to this proceeding were on notice that Valley would be made a party and was in fact made a party to this proceeding by Commission Order, FCC 72-767, *supra*, Valley's petition to file opposition will be granted, and its opposition considered herein.

Western concedes that its motion to enlarge issues is late but contends it has good cause for its late filing. In support of this contention, it states: that the motion was filed only eight days after present counsel undertook to represent it; that to grant its petition would not unduly delay the proceeding since the Presiding Judge has continued the prehearing conference to afford new counsel an opportunity to prepare for the case; that no party would be prejudiced by the addition of the issues; and that the nature of the case is such that even if the Board did not find good cause for the late filing, the issues should be added on the Board's own motion in the interest of having a full and fair hearing on its application for renewal of license.

3. The Review Board is not persuaded that the change of counsel is good cause for accepting Western's late filed motion. The designation Order, *supra*, appeared in the Federal Register on June 22, 1972; thus, all motions to enlarge issues should have been filed no later than July 7, 1972.[2] Western did not change counsel until August 3, 1972. However, in view of the facts that the renewal of an existing license is at stake and that the issues run to the character qualifications of the licensee, the Board will consider the merits of the motion. Western contends that since the issues in this proceeding allegedly flow from its operational practices, Commission precedent requires addition of a meritorious programming issue. The Review Board is satisfied that Western should be permitted to show meritorious past programming in the public interest.[3] However, as the Board has consistently held, such a showing must be limited to the licensee's performance before it learned that its license was in jeopardy, and the parties are free to argue the weight which should be accorded such evidence. Any mitigating effect of the evidence adduced pursuant to this issue must be limited to the fraudulent billing issue for, as the Board stated in *Friendly Broadcasting Co., supra*, if the licensee is found to have made willful misrepresentations to the Commission the fact that his station may have served the public interest, no matter how well, can be of no decisional significance. Finally, as to the question of the relevance of the evidence adduced under this issue to the comparative evaluation of the applicants, the Board notes that the Presiding Judge has initial jurisdiction, and therefore questions of this nature should be addressed to him in the first instances.

4. Western has also requested the Board to include an issue to determine whether a forfeiture might be in the public interest. As a preface to its request, Western expresses its willingness to waive the one-year statute of limitation as provided by Section 503(b)(2) of the Communications Act of 1934, as amended, with respect to alleged violations of Section 73.1205 of the Commission's Rules (as specified in the Bill

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[2] § 1.229 Motions to enlarge, change, or delete issues.
(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing.
(b) Such motions must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the Federal Register. Any person desiring to file a motion to enlarge, change, or delete the issues after the expiration of such 15 days must set forth the reason why it was not possible to file the petition within the prescribed 15 days. Unless good cause is shown for delay in filing, the motion will not be granted.

[3] *Friendly Broadcasting Company*, 35 FCC 2d 611, 24 RR 2d 712 (1972). *KFPW Broadcasting Co.*, 33 FCC 2d 313, 23 RR 2d 515 (1972); *Star Stations of Indianapolis, Inc.*, 28 FCC 2d 448, 21 RR 2d 646 (1971).

of Particulars dated July 1972). It argues that a party for whose protection a statute is intended may waive the statute. Further, Western points out that the purpose of the forfeiture provision of Section 503(b) of the Communications Act is to provide the Commission more flexibility in administering sanctions for rules' violation by its licensees, and contends that if Western is not permitted to waive the protection of the statute, it would deprive the Commission of that flexibility and effectively defeat the purpose of the statute.

5. The Broadcast Bureau contends that the Commission, in *Belk Broadcasting Company*, 29 FCC 2d 150, 21 RR 2d 989 (1971), determined that it had no power to impose a monetary forfeiture for alleged violations beyond the one-year limitation imposed by Section 503(b)(3) of the Communications Act, even though the applicant elected to waive the statute of limitations. This determination, the Bureau argues, effectively precludes a grant of Western's motion to include a forfeiture issue in this proceeding. The Bureau also urges that Western's request, set forth in its supplement to its motion to enlarge issues, must be denied because, even though some of the violations listed in the Bill of Particulars occurred less than one year before June 12, 1972 (the date of the designation Order), the Commission did not include a written notice of apparent liability in that Order and it is now too late to give the licensee such a notice.

6. The Review Board will deny Western's request to include a forfeiture issue in this proceeding. The Board is satisfied that the Commission's decision in *Belk* is controlling in this proceeding. The Board takes this action despite Western's argument that the Commission's statement of the law in the *Belk* case with respect to waiver of the statute of limitations is erroneous. The Board is satisfied that where there is a prior determination by the Commission with respect to a particular question of law, it is binding on the Review Board until that determination is reversed by either the Commission or the courts. Valley's request that the Board certify this question to the Commission will also be denied, because we see no useful purpose to be served by referring a question which has already been clearly and concisely answered by the Commission.

7. Accordingly, IT IS ORDERED, That the petition for leave to file an opposition to motion to enlarge issues and to find good cause for filing, filed August 24, 1972, by Las Vegas Valley Broadcasting Co. IS GRANTED;

8. IT IS FURTHER ORDERED, That the motion to enlarge issues, filed August 11, 1972, by Western Communications, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects;

9. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED as follows:

To determine whether the programming of Station KORK–TV has been meritorious, particularly with regard to public service programs.

9. IT IS FURTHER ORDERED, That the burdens of proceedings with the introduction of evidence and proof under the issue added herein SHALL BE on Western Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSE OF WESTERN CONNECTICUT BROADCASTING CO. For Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM Stamford, Connecticut	Docket No. 19043

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT

1. On October 8, 1970, the Commission directed Western Connecticut Broadcasting Company (Western) to show cause why its licenses for stations WSTC and WSTC-FM, Stamford, Connecticut, should not be revoked.[1] Following hearings held on October 19–22, 1971, and December 21, 1971, the Administrative Law Judge released an Initial Decision in which he concluded that revocation was not required but that a forfeiture of $10,000.00 should be assessed against Western. FCC 72D-50, issued July 27, 1972.[2] After the revocation hearing had begun, but prior to the release of the Judge's Initial Decision, Western filed an application (BR-1150) for renewal of its license for station WSTC, due to expire on April 1, 1972. On March 1, 1972, Radio Stamford, Inc. (Radio Stamford) filed an application for a new standard broadcast station in Stamford. This application is mutually exclusive with Western's renewal application for WSTC. Also on March 1, 1972, Radio Stamford filed a petition with the Commission requesting that it either: (1) terminate the WSTC revocation proceeding, consider Western's license for WSTC as expired on April 1, 1972, and grant Radio Stamford's application or (2) consolidate the Radio Stamford application with the WSTC revocation hearing. We denied these requests, holding that the revocation proceeding must be completed before action would be taken on Radio Stamford's application. 35 FCC 2d 776, released July 3, 1972. On July 27, 1972, Radio Stamford filed with the Administrative Law Judge a Petition for Leave to Intervene in the WSTC revocation proceeding. The Judge dismissed the petition as moot, holding that he had no jurisdiction in the proceeding

[1] Issues were designated to determine whether the licensee had illegally censored political broadcasts, whether it had failed to afford equal opportunities to all political candidates for the same political office, whether the licensee had misrepresented facts to the Commission, and whether the licensee had violated certain record keeping and logging requirements of the Commission's Rules.

[2] Both Western and the Chief of the Broadcast Bureau have filed exceptions to the Initial Decision. The exceptions are currently awaiting decision before the Commission.

since he had issued his Initial Decision on July 27, 1972, and did not receive Radio Stamford's petition until July 28, FCC 72M–983, issued July 28, 1972.

2. Now before the Commission is a Petition for Intervention filed by Radio Stamford on October 3, 1972, in which Radio Stamford once again seeks, this time from the Commission, permission to intervene in the WSTC license revocation proceeding.[3] In support of its petition, Radio Stamford argues that it should be allowed to intervene and to participate in the remaining phases of the revocation proceeding in order to protect its own rights, as a renewal challenger, as well as the rights of the public. If permitted to intervene, Radio Stamford asserts that it will assist the Commission in arriving at the earliest possible termination of the revocation proceeding in order to allow the Commission to proceed with a consideration of Radio Stamford's construction permit application for the Stamford AM facility now licensed to Western.[4]

3. We shall deny Radio Stamford's petition for intervention for failure to comply with Section 1.223(b) of our Rules. Under this section, intervention in revocation proceedings is granted in the discretion of the Commission and may not be achieved as a matter of right.[5] See *Victor Muscat*, 31 FCC 2d 620 (1971). Under Section 1.223(b) a petition for intervention must show, *inter alia*, how the petitioner's participation "will assist the Commission in the determination of the issues in question." As we stated in *Victor Muscat*, *supra*, 31 FCC 2d at 621:

> It would seem reasonable, particularly in a prosecutory-type proceeding where the agency has the burden of proof, to require a substantial showing of special circumstances in order to justify intervention by parties who are otherwise strangers to the proceeding. Such showing would require that the intervenors raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the petitioner the status of a party.

Radio Stamford has not even attempted to comply with these requirements. It has not shown or alleged that, if it is not allowed to intervene, important issues of fact or law will not be adequately raised or argued. Nor has it shown how its participation will be in any degree helpful to the Commission in resolution of this proceeding. The only contention advanced by Radio Stamford in support of its petition is the allegation that if allowed to intervene it will assist the Commission in arriving at the earliest possible termination of the case. In fact, however, the reverse is true. Admittance of Radio Stamford at this late phase of the proceeding will only serve to delay its final resolution. The hearing has been completed, an Initial Decision

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[3] Other pleadings before the Commission are oppositions to the Petition for Intervention filed by the Chief of the Broadcast Bureau on October 13, 1972, and by Western on October 16, 1972.

[4] Portions of Radio Stamford's petition for intervention appear to reargue its contention that its construction permit application should be considered in conjunction with the WSTC revocation proceeding. This argument was rejected in our Memorandum Opinion and Order released July 3, 1972, 35 FCC 2d 776, and will not be reconsidered herein.

[5] Section 1.223(a) provides for intervention as a matter of right through timely filing, in "cases involving applications for construction permits and station licenses, or modifications or renewals thereof." The section thus by its terms does not apply to revocation proceedings.

issued, and exceptions thereto filed with the Commission. All that remains to be done in this case is Commission review of the exceptions. Were Radio Stamford allowed to intervene, however, the only demonstrable result would be a proliferation of pleadings and unavoidable delay. We therefore must regard as spurious the argument that the intervention of Radio Stamford would result in an earlier resolution of this proceeding.

4. We further note that Radio Stamford's Petition for Intervention is untimely and also must be denied on that basis. Section 1.223 (b) provides that a petition for leave to intervene must be filed "not later than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto." The Review Board's enlargement of the issues in this case, FCC 70R–55, released December 30, 1970,[6] was published in the Federal Register on January 7, 1971, 36 Fed. Reg. 233, while Radio Stamford did not file its petition seeking intervention with the Administrative Law Judge until July 2, 1972, nor with the Commission until October 3, 1972. Clearly, Radio Stamford could not have sought intervention within 30 days of January 7, 1971, since it did not come into existence as a corporation until December, 1971. Nevertheless, it has offered no explanation why it did not seek intervention at an earlier point than it did, particularly since its competing application for the license for WSTC was filed as early as March 1, 1972. Certainly, it was incumbent upon Radio Stamford to seek intervention at the earliest possible time, and not to wait until the proceeding was nearly terminated. See *Spanish International Broadcasting Co.* v. *FCC*, 385 F. 2d 615 (D.C. Cir. 1967). Although Radio Stamford has requested a waiver of Section 1.223 of our Rules in order to file its petition after the prescribed time, it has advanced no reasons to support its request. The tardiness in filing its petition is unexplained and Radio Stamford has asserted no public interest considerations which would warrant a grant of a waiver. We therefore will deny the requested waiver.

5. Accordingly, IT IS ORDERED, That the request for waiver of Section 1.223 of the Commission's Rules, filed on October 3, 1972, by Radio Stamford, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the Petition for Intervention, filed on October 3, 1972, by Radio Stamford, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[6] On this date, the Board added an issue to determine whether the programming of stations WSTC and WSTC–FM has been meritorious, particularly with regard to public service programs.

F.C.C. 73R-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WTAR RADIO-TV CORP. (WTAR-TV), NORFOLK, VA. For Renewal of Broadcast License	Docket No. 18791 File No. BRCT-54
HAMPTON ROADS TELEVISION CORP., NORFOLK, VA. For Construction Permit for New Television Broadcast Station	Docket No. 18792 File No. BPCT-4281

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1973; Released January 10, 1973)

BY THE REVIEW BOARD:

1. The Review Board has before it an appeal from an evidential ruling of the Administrative Law Judge in the above-captioned proceeding, filed November 8, 1972, by Mr. George K. Walker, a public witness in that proceeding.[1] In essence the motion seeks to have the Review Board reverse the Presiding Judge's ruling with respect to the admission of certain exhibits tendered by Walker.

2. The appeal is procedurely defective and must be denied. It does not comply with the procedural requirements set forth in Section 1.301(b) of the Commission's Rules. Nor does the instant appeal come within the provisions of Section 1.301(a) of the Commission's Rules since it does not: deal with Walker's right to participate as a party in this proceeding; claim privilege; permit inspection of documents not routinely available for public inspection; or grant a joint request filed pursuant to Section 1.525 of the Commission's Rules. Moreover, the evidential rulings complained of are properly within the jurisdiction of the Presiding Judge and there is no showing that such rulings are arbitrary or capricious.

3. Accordingly, IT IS ORDERED, That the appeal from the Administrative Law Judge's ruling, filed November 8, 1972 by George R. Walker IS DENIED, and

4. IT IS FURTHER ORDERED, That the motion to dismiss appeal filed November 17, 1972, by WTAR Radio-TV Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] The Board also has before it an opposition to appeal, filed November 21, 1972, by the Broadcast Bureau and a motion to dismiss appeal, filed November 17, 1972, by WTAR Radio-TV Corporation.